Federal Court  Cour fédérale

Date: 20230814

Docket: T-846-21

Citation: 2023 FC 1105

Ottawa, Ontario, August 14, 2023

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

SOUTHERN RAILWAY OF BRITISH COLUMBIA LIMITED

Applicant

and

VANCOUVER FRASER PORT AUTHORITY AND DP WORLD LOGISTICS CANADA INC.

Respondents

REASONS AND ORDER

I. INTRODUCTION

[1] By an Order dated December 9, 2022, Associate Judge Ring granted in part the motion filed by Southern Railway of British Columbia Limited (the "Applicant" or "SRY"), seeking the production of certain documents by the Vancouver Fraser Port Authority (the "VFPA") and DP

World Logistics Canada Inc. (“DPW”), collectively the Respondents (the “Respondents”) in the Notice of Application for judicial review that was filed on May 21, 2021.

[2] The Order of December 9, 2022, provides as follows:

> THIS COURT ORDERS that:
>
> 1. SRY’s motion is granted in part.
>
> 2. Subject to paragraph 3 of this Order, DPWL shall transmit the following materials to the Court Registry and to SRY within twenty-one (21) days of the date of this Order:
>
> (a) any contract or lease agreement concerning the use, operation, or management of the “Lands” (as defined in the Notice of Application), or purporting to confer upon DPWL the legal authority to impose fees on port users, including (without limitation) the Rail Services Tariff, entered into by: (i) VFPA; and (ii) DPWL;
>
> (b) any materials relied upon by DPWL to devise the fees set out in the Rail Services Tariff; and
>
> (c) any correspondence between: (i) DWPL; and (ii) VFPA, DPFS, or any other related entity or any other third parties, regarding the formulation and implementation of the Rail Services Tariff.
>
> 3. If necessary, the Court may entertain a request for an extension of time for DPWL to transmit the materials set out in in [*sic*] paragraph 2 of this Order if the Respondents, or either of them, seek a confidentiality order with respect to any of those materials.
>
> 4. To the extent that SRY’s motion seeks production of Requested Materials from DPWL that are not specified in paragraph 2 of this Order, the motion is dismissed.
>
> 5. SYR’s motion for an order compelling production of Requested Materials from VFPA pursuant to Rule 317 is also dismissed.

> 6. Costs of the motion, hereby fixed in the amount of $1,500.00, inclusive of disbursements and taxes, shall be paid by DPWL and VFPA to SRY in any event of the cause.

[3] By a Notice of Motion filed on December 19, 2022, DPW appealed from that Order, pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106 (the "Rules"). It seeks the following relief:

> 1. A stay of the order of Case Management Judge dated December 9, 2022 (the "Order") pending the hearing and determination of this motion;
>
> 2. An order setting aside the Order;
>
> 3. Costs of this motion; and
>
> 4. Such further and other relief as DPWL may request and this Honourable Court may allow.

[4] SRY did not appeal the Order relative to the VFPA. The VFPA filed brief submissions, supporting the arguments advanced by DPW.

II. BACKGROUND

[5] SRY filed an application for judicial review on May 21, 2021, challenging the imposition of a tariff by DPW. It named DPW and the VFPA as Respondents. It seeks the following relief in its application for judicial review:

> The Applicant seeks an order or orders:
>
> a. quashing the decision to impose the Rail Services Tariff;
>
> b. in the alternative, declaring that the Rail Services Tariff does not apply to the Applicant;

c. requiring that any funds paid by the Applicant in respect of the Rail Services Tariff be returned to the Applicant;

d. granting the Applicant its costs of this application; and

e. such further and other relief as this Honourable Court may deem just.

[6] In its application for judicial review, SRY included a request for the production of the following material:

1. Any contract or lease agreement concerning the use, operation, or management of the Lands, or purporting to confer upon DP World Logistics the legal authority to impose fees on port users, including (without limitations) the Rail Services Tariff, entered into by:

    a. VFPA; and

    b. DP World Logistics, or DP World FSD, or any other related entity.

2. Any materials relied upon by VFPA, or DP World Logistics, or DP World FSD, or any other related entity, to devise the fees set out in the Rail Services Tariff.

3. Any correspondence among VFPA, DP World Logistics, DP World FSD, or any other related entity, or any other third parties, regarding the formulation and implementation of the Rail Services Tariff.

4. Any other documents relevant to a matter in issue in the within proceeding.

[7] By letter dated September 7, 2021, the VFPA objected to SRY's request for production of a certified copy of the materials identified in the Notice of Application, on the grounds that it has not acted as a "tribunal" or made an "order" in connection with DPW's Rail Services Tariff.

[8] By letter dated September 8, 2021, DPW objected to SRY's request for production of a certified copy of the materials identified in the Notice of Application, on the grounds that Rule 317 is inapplicable to DPW because it is not a "tribunal" and there is no "order", pursuant to the Rules.

[9] As per rule 2 of the Rules, "tribunal" has the same meaning as "federal board, commission or other tribunal" in the *Federal Courts Act*, R.S.C., 1985, c. F-7.

[10] Associate Judge Ring convened a Case Management Conference to discuss the next steps. On October 15, 2021, she issued an Order in the following terms:

> THE COURT ORDERS that:
>
> 1. The application shall continue as a specially managed proceeding.
>
> 2. The Court Registry is directed to refer the matter to the office of the Chief Justice for the appointment of a Case Management Judge.
>
> 3. Unless otherwise directed by the Case Management Judge, the parties shall, within fifteen (15) days of the date of the appointment of a Case Management Judge, confer with one another and submit an update as to the status of the proceeding.
>
> 4. The Rule 318(2) objections shall be determined by a formal motion to be brought by the Applicant. The parties shall, after conferring with one another and by October 27, 2021, submit a joint proposal timetable for the exchange of motion materials as well as their dates of availability for an oral hearing of the motion.

[11] On October 22, 2021, Associate Judge Ring was appointed the Case Management Judge in this proceeding.

[12] SRY filed its motion record on December 17, 2021. In its notice of motion it sought the following relief:

> 1. An Order that the Respondents Vancouver Fraser Port Authority ("VFPA") and DP World Logistics Canada Inc. ("DP World Logistics") transmit to the Applicant, pursuant to Rule 318(4), all materials relevant to the Decision, as defined in the Notice of Application as follows:
>
>   a. Any contract or lease agreement concerning the use, operation, or management of the Lands, or purporting to confer upon DP World Logistics the legal authority to impose fees on port users, including (without limitation) the Rail Services Tariff, entered into by VFPA and DP World Logistics, or DP World FSD, or any other related entity;
>
>   b. Any materials relied upon by VFPA, or DP World Logistics, or DP World FSD, or any other related entity, to devise the fees set out in the Rail Services Tariff;
>
>   c. Any correspondence among VFPA and DP World Logistics, DP World FSD, or any other related entity, or any other third parties, regarding the formulation and implementation of the Rail Services Tariff and
>
>   d. Any other documents relevant to a matter in issue in the within proceeding (collectively, the "Requested Materials").
>
> 2. An Order awarding costs of this motion to SRY; and
>
> 3. Such further and other relief as this Honourable Court may deem just.

[13] The evidence before the Associate Judge consisted of affidavits, together with attached exhibits. SRY filed the affidavits of Mr. Gerald Linden, Mr. Ryan Simpson and Ms. Aelene Guingcangco, in its motion record that was filed on December 17, 2021.

[14] The VFPA filed the affidavits of Mr. Lindsay Colin and Ms. Prairie Jolliffe in its motion record that was filed on January 14, 2022.

[15] DPW filed the affidavit of Mr. Tabare Dominguez in its motion record that was filed on January 14, 2022.

[16] Mr. Linden is the President of SRY. In his affidavit, he provided an overview of the operations of SRY, a corporation created under the laws of British Columbia. SRY is a freight railway that uses facilities on lands operated by the VFPA in the Port of Vancouver, including rail lines in the Port Authority Rail Yard (the "PARY").

[17] Mr. Linden also deposed that to his knowledge, SRY had not "paid any fees to use the PARY" in connection with its operations in the Port of Vancouver.

[18] Mr. Simpson is the Director, Business Development with SRY. Among other things, he deposed that he was informed on December 8, 2020, that DPW "intended to impose a rail services tariff for all users" of the PARY.

[19] Ms. Guingcangco is a paralegal with the law firm Borden Ladner Gervais LLP, solicitors for the Applicant. In her affidavit, she deposed about the conduct of certain web searches relating to the creation of the VFPA by Letters Patent issued by the Government of Canada and to the location of the PARY that may be subject to the rail services tariff.

[20] Mr. Colin is the Director of Real Estate for the VFPA. In his affidavit, he responded to the affidavit of Mr. Linden. Among other things, he deposed that he disagrees "that the VFPA or anyone on its behalf has fixed or imposed the "fee" as contended by SRY".

[21] Mr. Colin also deposed that the VFPA collects certain fees, such as berthage and wharfage fees, as contemplated by the *Canada Marine Act*, S.C. 1998, c. 10. He further deposed that the VFPA has never imposed a "fee", within the meaning of the *Canada Marine Act*, *supra* relative to the PARY.

[22] Ms. Jolliffe is a legal assistant with Owen Bird Law Corporation, solicitors for the VFPA. Attached to her affidavit, as an exhibit, is an email correspondence about SRY's request for the production of documents.

[23] Mr. Dominguez is the Commercial Director of DPW and DP World Fraser Surrey Inc. He deposed that DPW is a federally incorporated company that is registered in British Columbia as an extra-provincial corporation.

[24] Mr. Dominguez addressed the status of DPW as a "delegate" of the VFPA in paragraphs 9 and 10 of his affidavit, deposing in paragraph 9 that DPW "has not been delegated any powers by VFPA with regard to imposing or collecting fees for rail or cargo movements or other activity, within the PARY on behalf of VFPA".

[25] Mr. Dominguez deposed that his affidavit was filed in support of DPW's objection to the production of materials, as requested by SRY.

[26] In the Reasons for Order delivered on December 9, 2022, Associate Judge Ring determined that DPW was effectively raising a jurisdictional argument in resisting SRY's demand for production. She applied the test of "plain and obvious" and concluded:

> [63] In conclusion, for the reasons set out above, it is not plain and obvious that DPWL is not a "tribunal" or that DPWL's decision to impose the Rail Services Tariff is not an "order". Accordingly, I conclude that SRY can invoke Rule 317 to seek disclosure of relevant materials from DPWL.

III. SUBMISSIONS

[27] DPW now argues that the Associate Judge erred in law by applying the wrong test to SRY's motion pursuant to Rule 318. It submits that applying the wrong test is an error of law that is reviewable on the standard of correctness, citing the decision in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, [2017] 1 F.C.R. 331 (F.C.A.). It argues that the Order should be set aside.

[28] DPW further contends that the Associate Judge breached procedural fairness by directing a specific process, in the Order of October 15, 2021, and then deciding SRY's motion on the basis of a different process, subject to a different legal test, all without notice.

[29] Otherwise, DPW submits that the Order of the Associate Judge discloses a palpable and overriding error and further, was made without regard to the evidence.

[30] The VFPA filed brief submissions, supporting those made by DPW.

[31] SRY, for its part, argues that the Associate Judge committed no reviewable error, in law or otherwise. It submits that presumptively, she considered all the evidence and reasonably assessed it before ordering DPW to produce documents.

IV. DISCUSSION AND DISPOSITION

[32] The first issue to be considered is the applicable standard of review. In *Hospira Healthcare Corporation*, *supra*, the Federal Court of Appeal addressed the standard of review that applies upon the appeal of a decision of an Associate Judge, as follows:

> [27] […] a discretionary decision made by a prothonotary is clearly wrong, and thus reviewable on appeal by a judge, where it is based: (1) upon a wrong principle – which implies that correctness is required for legal principles – and (2) upon a misapprehension of facts – which seems to be the equivalent of the "overriding and palpable error" criterion of the *Housen* standard if it caused the Prothonotary's decision to be "clearly wrong".
>
> […]
>
> [66] In *Housen*, the Supreme Court enunciated the standard of review applicable to decisions of trial judges. More particularly, it concluded that with respect to factual conclusions reached by a trial judge, the applicable standard was that of palpable and overriding error. It also stated that with respect to questions of law and questions of mixed fact and law, where there was an extricable legal principle at issue, the applicable standard was that of correctness ([*reference omitted*]).

[33] SRY sought the production of materials from the VFPA and DPW pursuant to Rules 317 and 318 of the Rules. Rules 317 and 318 provide as follows:

Material from tribunal

317 (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.

Request in notice of application
(2) An applicant may include a request under subsection (1) in its notice of application.

Service of request
(3) If an applicant does not include a request under subsection (1) in its notice of application, the applicant shall serve the request on the other parties.

Materials to be transmitted
318 (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit

(a) a certified copy of the requested material to the Registry and to the party making the request; or

Matériel en la possession de l'office fédéral
317 (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

Demande inclue dans l'avis de demande
(2) Un demandeur peut inclure sa demande de transmission de documents dans son avis de demande.

Signification de la demande de transmission
(3) Si le demandeur n'inclut pas sa demande de transmission de documents dans son avis de demande, il est tenu de signifier cette demande aux autres parties.

Documents à transmettre
318 (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :

a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;

b) au greffe les documents qui ne se prêtent pas à la

(b) where the material cannot be reproduced, the original material to the Registry.

Objection by tribunal
(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.

Directions as to procedure
(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).

Order
(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.

reproduction et les éléments matériels en cause.

Opposition de l'office fédéral
(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.

Directives de la Cour
(3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.

Ordonnance
(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

[34] The Associate Judge set out a process for the parties to address the objections raised by the VFPA and DPW, as contemplated by Rule 318(3). I agree that the Associate Judge did not follow that procedure in disposing of the Motion before her and in the circumstances, of this case, this failure amounts to a breach of procedural fairness.

[35] The fundamental element of procedural fairness is that the opposing party has the opportunity to know the case "against" it and to have the opportunity to be heard. I refer to the decision in *Canadian Pacific Railway Company v. Canada (Attorney General)*, [2019] 1 F.C.R. 121, where the Federal Court of Appeal said the following at paragraph 56:

> [56] No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond. […]

[36] In my opinion, the same principle applies to a decision made by a judicial officer.

[37] By adopting a process other than the one set out in the Order of October 15, 2021, the Associate Judge interfered with the right of DPW to know the case it had to meet.

[38] The Associate Judge outlined one process, but followed another. The VFPA and DPW had the opportunity to make submissions, and did so in the process set out in the Order of October 28, 2021. However, that process was not the basis for the Order ultimately made by the Associate Judge.

[39] In my opinion, the Associate Judge erred in law by setting out one process for the parties to follow but making her decision on the basis of another process, that is by applying the test upon a motion to strike. That test is set out in the decision in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.) at page 600, as follows:

> […] This is not to say that there is no jurisdiction in this Court either inherent or through Rule 5 by analogy to other rules, to dismiss in summary manner a notice of motion which is so clearly improper as to be bereft of any possibility of success. Such cases

> must be very exceptional and cannot include cases such as the present where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion.

[40] The Associate Judge, in her reasons, characterized the issue raised by DPW in its objection to the request for the production of materials, as one of "jurisdiction". She then applied the high test of whether it is "plain and obvious" that the application for judicial review has no chance of success.

[41] I agree with the submissions of DPW, supported by the VFPA, that the Associate Judge erred in law in applying this test when the Order of October 15, 2021, did not indicate that the Motion by SRY would involve this test.

[42] The application of the wrong legal test is an error of law. I refer to the decision in *Rahman v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 430, where the Court said the following:

> [3] […] The determination of the proper test to be applied by the RPD is a question of law, and so the standard of review of its decision is correctness.

[43] An error of law justifies intervention.

[44] Finally, I turn to the arguments made about palpable and overriding error, arising from the alleged failure of the Associate Judge to consider the evidence submitted by the parties.

[45] In his lengthy affidavit, Mr. Linden provides a history of the operation of SRY, historically, in the Port of Vancouver.

[46] In his affidavit, Mr. Dominguez clearly deposed to the status of DPW as a commercial entity, acting independently of the VFPA, that is, not as an agent.

[47] In his affidavit, Mr. Colin deposed that the VFPA had not appointed DPW as its agent.

[48] SRY did not cross-examine any of the deponents whose affidavits were filed on behalf of the two Respondents.

[49] According to the decision in *Maldonado v. Minister of Employment and Immigration,* [1980] 2 F.C. 302 at page 305, there is a presumption that the contents of an affidavit are true unless there is a reason to doubt their truthfulness.

[50] The strengths or otherwise of affidavit evidence can be tested by cross-examination. Rule 83 of the Rules provides as follows:

Cross-examination on affidavits **83** A party to a motion or application may cross-examine the deponent of an affidavit served by an adverse party to the motion or application.	**Droit au contre-interrogatoire** **83** Une partie peut contre-interroger l'auteur d'un affidavit qui a été signifié par une partie adverse dans le cadre d'une requête ou d'une demande.

[51] SRY argues that it was not obliged to cross-examine and relies on the decision in *SSE Holdings, LLC v. Le Chic Shack Inc.,* 2020 FC 983 at paragraph 58:

> [58] […] However, a failure to cross-examine does not mean that the Court has to accept a witness' evidence without any reservation and does not magically confer additional or irrefutable probative value to this witness' evidence. Nor does it improve or magnify the sufficiency of the testimonial evidence offered. The Court must still assess the affidavit evidence to determine its probative value and weigh it in the context of the balance of the evidence on the record ([*citation omitted*]).

[52] I do not see how this statement of general principle assists the Applicant.

[53] The fact remains that in its Notice of Application at paragraph 13, SRY set out certain factual allegations as follows:

> At all material times, DP World Logistics devised and enacted the Rail Services Tariff in its capacity as an agent or representative of VFPA, and pursuant to the fee-making powers conferred upon the VFPA under the *Canada Marine Act*. The terms and conditions of any agreement between VFPA and DP World Logistics purporting to endow DP World Logistics with the authority to enact the Rail Services Tariff, and to apply it to port users in respect of access to the Lands, are entirely unknown to SRY. SRY will provide further particulars regarding the terms and conditions of any such agreement as they become known to SRY.

[54] The affidavits filed by DPW and the VFPA squarely respond to the allegation that DPW is an "agent" or representative of the VFPA. The allegation is denied.

[55] In the face of this denial, which was not tested by cross-examination, it seems to me that the Associate Judge made findings of fact without regard to the evidence. In *H.L. v. Canada*

(Attorney General), [2005] 1 S.C. R. 401 at paragraph 55, the Supreme Court of Canada commented on the authority of appellate courts to review findings of fact, as follows:

> [55] "Palpable and overriding error" is at once an elegant and expressive description of the entrenched and generally applicable standard of appellate review of the findings of fact at trial. But it should not be thought to displace alternative formulations of the governing standard. In *Housen*, for example, the majority (at para. 22) and the minority (at para. 103) agreed that inferences of fact at trial may be set aside on appeal if they are "clearly wrong". Both expressions encapsulate the same principle: an appellate court will not interfere with the trial judge's findings of fact unless it can plainly identify the imputed error, and that error is shown to have affected the result.

[56] I am satisfied that in ordering DPW to produce certain materials, the Associate Judge implicitly found that it is a "federal board, commission or other tribunal", as per section 2 of the *Federal Courts Act, supra*.

[57] This finding is contrary to the evidence submitted by DPW and the VFPA. The reasons of the Associate Judge fail to address the evidence submitted by the Respondents on a critical fact. The Respondents have met the test for showing a "palpable and overriding error" on the part of the Associate Judge. This error is another basis for allowing the appeal taken by DPW.

[58] In the result, the appeal will be allowed, the Order made by the Associate Judge on December 9, 2022, will be set aside, with costs to the Respondents.

ORDER in T-846-21

THIS COURT ORDERS that the appeal is allowed and the Order of the Associate Judge made on December 9, 2022, is set aside, with costs to DP World Logistics Canada Inc. and the Vancouver Fraser Port Authority.

If the parties cannot agree on costs, brief submissions can be served and filed by September 29, 2023.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-846-21
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PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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REASONS AND ORDER:	HENEGHAN J.
DATED:	AUGUST 14, 2023

APPEARANCES:

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George J. Roper	FOR THE RESPONDENT VANCOUVER FRASER PORT AUTHORITY
Peter Swanson	FOR THE RESPONDENT DP WORLD LOGISTICS CANADA INC.

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