Federal Court  Cour fédérale

Date: 20110621

Docket: T-345-11

Citation: 2011 FC 740

Montréal, Quebec, June 21, 2011

PRESENT: Richard Morneau, Esq., Prothonotary

BETWEEN:

54039 NEWFOUNDLAND AND LABRADOR LIMITED T/A GEORGE STREET ASSOCIATION

Applicant

and

ST. JOHN'S PORT AUTHORITY

Respondent

REASONS FOR ORDER AND ORDER

[1] This application involves a challenge of a decision of the St. John's Port Authority (SJPA) to lease federal property located on the waterfront of the St. John's Harbour to Harbour Walk Hospitality Inc. (Harbour Walk). The lease was for a parcel of vacant land to be used by Harbour Walk for the construction and operation of a restaurant. The subject property is known as Pier 7. The applicant George Street Association (GSA) is an association of local restaurants

and bars. The SJPA leased the property to Harbour Walk for an undisclosed rate and term, allegedly without inviting other proposals.

[2] The GSA asks that the Court set aside the SJPA's decision to lease the land on the grounds that the SJPA erred by failing to fully ascertain the fair market value of the subject property and to lease the land at its full market value, erred in law and violated the rules of procedural fairness by failing to allow other parties to submit proposals regarding the subject property, and erred by providing an existing tenant with a right of first refusal. The SJPA's letters patent provide that the SJPA must ensure that leases not be for less than fair market value.

[3] According to the GSA, the GSA and its members who own premises in the vicinity of the subject property are affected by and have an interest in the lease and the proposed development.

[4] On March 17, 2011, the SJPA brought this motion to strike the GSA's application. On May 3, 2011, I issued an order upholding the SJPA's objection to producing material under rule 317 of the *Federal Courts Rules* pending the determination of the motion to strike.

[5] The grounds for this motion are as follows:

a. the SJPA is not a "federal board, commission or other tribunal" subject to judicial review;

b. the GSA lacks standing to bring the application; and

c. the application is time barred under s. 18.1(2) of the *Federal Courts Act*, R.S.C., 1985, c. F-7.

[6] Upon reading the materials presented by both sides and hearing oral submissions on June 1, 2011, I have determined, for the following reasons, that the SJPA's motion to strike must be allowed.

Jurisdiction

[7] Only a "federal board, commission or other tribunal" (for concision, "federal tribunal") will be subject to judicial review in the Federal Court (s. 18.1, *Federal Courts Act*). It is trite that a body may be qualified as a federal tribunal for some purposes but not for others; the key question is whether the body, in making the decision sought to be reviewed, was acting as a federal tribunal. This is clear from the definition of federal tribunal provided in s. 2 of the *Federal Courts Act*:

> "federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;

[8] The Court appreciates that motions to strike applications for judicial review are not to be granted lightly; the application must be "so clearly improper as to be bereft of any possibility of

success": *David Bull Laboratories (Canada) v Pharmacia*, [1995] 1 F.C. 588, at para. 15. Justice de Montigny provided useful guidance on the exceptional nature of motions to strike in applications for judicial review in *Esgenoôpetitj (Burnt Church) First Nation v Canada (Human Resources and Skills Development)*, 2010 FC 1195, where at para. 32 he wrote that:

> … a motion to strike is an exceptional remedy, especially in the context of an application for judicial review. Since such an application is meant to be dealt with summarily, it is ordinarily more proper to deal with any objection to the application in the context of the hearing on the merits, if only because a full grasp of the facts and of the context will often be necessary to deal with the objection. I agree with the Applicant, therefore, that a motion to strike will not be granted except in the most obvious and exceptional circumstances, where a notice of application is so fundamentally flawed that it has no chance of success: see, *inter alia*, *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.); *Moses v. R.*, 2002 FCT 1088, at para. 6.

[9] Even in light of the high threshold to be met on a motion to strike an application for judicial review, based on the following analysis, this application must be struck because it is clear that the SJPA was not acting as a federal tribunal in its leasing of the subject property. Any additional facts or context that might come to light upon a full hearing could not change this conclusion. This is because Justice Mactavish's decision in *DRL Vacations Ltd v Halifax Port Authority*, 2005 FC 860, [2006] 3 F.C.R., (*DRL Vacations*) is dispositive of the issue of whether the SJPA was acting as a federal tribunal. *DRL Vacations* is precisely the kind of decision the Federal Court of Appeal was referring when it described the exceptional circumstances necessary to justify a motion to strike in the context of an application for judicial review in *LJP Sales Agency v Canada (National Revenue)*, 2007 FCA 114, at para. 8 (*LJP Sales*):

> … the presence of an authority which is directly contrary to the position on which an application is based can be such an exceptional circumstance, when no further development of the factual record is required.

[10] Throughout its submissions and at the oral hearing of this motion, the SJPA maintained that *DRL Vacations* is materially indistinguishable from the case at hand. I agree. In *DRL Vacations*, the applicant DRL challenged the decision of the respondent Halifax Port Authority to lease property, described as a souvenir shop, market, or retail outlet, to another party. DRL sought to judicially review the Port Authority's decision on the grounds that the tender process adopted was flawed. Justice Mactavish provided a comprehensive review of the relevant authorities. Her key finding was as follows, as para. 55:

> In my view, such a souvenir shop is a purely commercial enterprise, one which is incidental to the HPA's main responsibility for managing port activities relating to shipping, navigation, transportation of goods and passengers and the storage of goods. As such, I find that the HPA was not acting as a "federal board, commission or other tribunal" when it made the decision under review in this case.

[11] For its part, the GSA attempts to analogize the situation in the case at bar to the case of *Halterm Ltd v Halifax Port Authority* (2000), 184 FTR 16 (TD) (*Halterm*), where the Court found that the Halifax Port Authority was acting as a federal tribunal in negotiating for the lease of a container port terminal. However, as noted by the SJPA, Justice Mactavish specifically rejected the reasoning in *Halterm* at para. 61 of *DRL Vacations*, where she concluded that "to the extent that *Halterm* is not distinguishable from the present case, I must respectfully decline to follow it." Even if Justice Mactavish had not rejected the Court's findings in *Halterm*, I find that a restaurant (as in this case) and a souvenir shop (as in *DRL Vacations*) are of a different nature

than the rental of a container port terminal, which is more intimately connected to a port authority's core functions, as described in the *Canada Marine Act*, S.C. 1998, c. 10.

[12] Paragraph 28(2)(*a*) of the *Canada Marine Act* provides that the power of a port authority to operate a port is limited to the power to engage in "port activities related to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods." These are the core powers and functions of a port authority such as the SJPA. The leasing of land unrelated to shipping, navigation, transportation, and handling and storage are not public powers, but rather constitute part of the private powers exercisable by a private corporation. These private powers are incidental to the SJPA's core public functions.

[13] The GSA places great emphasis on Article 8.3 of the SJPA's Letters Patent, which requires the SJPA not to lease property for less than fair market value. However, this fair market value requirement is somewhat of a red herring given that the lease of the subject property is not a public power as contemplated by the *Canada Marine Act*. Article 8.3 of the Letters Patent is not helpful in determining whether the SJPA is exercising a public power and it does not change the nature, character, or source of the power exercised by the SJPA.

[14] In my view, all of the above determinations are supported by Justice Mactavish's findings at paras. 55-62 of *DRL Vacations*, which I read as confirming the SJPA's position. Justice Mactavish's comments warrant reproduction here. She wrote that:

> [55] In my view, such a souvenir shop is a purely commercial enterprise, one which is incidental to the HPA's main responsibility for managing port activities relating to shipping, navigation,

transportation of goods and passengers and the storage of goods. As such, I find that the HPA was not acting as a "federal board, commission or other tribunal" when it made the decision under review in this case.

[56] As a consequence, I am satisfied that the Court does not have jurisdiction to deal with this application for judicial review.

[57] In coming to this conclusion [that the Halifax Port Authority was not acting as a federal tribunal], I am also influenced by the fact that in enacting the *Canada Marine Act* and in creating the HPA, Parliament clearly intended to ensure that the Port of Halifax is run in a commercially viable fashion. Entitling parties to judicially review every decision made in relation to federally-owned Port property, however incidental that decision may be to the operation of the Port itself would, in my view, be the sort of absurd and very inconvenient result contemplated by Justice Thurlow in *Wilcox*, and, moreover, would be antithetical to the achievement of Parliament's intent in creating the HPA.

[58] The fact that the space in question is on federal land is not determinative of the issue, in my view. A number of the cases referred to above dealt with decisions relating to the expenditure or management of public property - that is tax dollars. These monies are monies to which ordinary private companies would not have access. Nevertheless, in cases such as *Wilcox*, *Cairns* and *Toronto Independent Dance Enterprises*, the Courts have found that the institutions in question were not acting as federal boards, commissions or other tribunals in making the decisions under review.

[59] In *Halterm*, the Court was dealing with the lease of real property for a container port terminal, whereas in this case, what is in issue is the licencing of space to be used for a souvenir shop.

[60] *Halterm* is, therefore, arguably distinguishable from the present situation in that the transaction in question in that case was much more directly related to the business of the HPA as a port. In my view, the provision of a souvenir shop for the passengers and crew of cruise ships is considerably more incidental to the business of the Port of Halifax.

[61] However, for the reasons given, to the extent that *Halterm* is not distinguishable from the present case, I must respectfully decline to follow it.

> [62] Before closing, I should note that my decision should not be interpreted to mean that the HPA could never be considered to be a "federal board, commission or other tribunal" as contemplated by the *Federal Courts Act*. It is clear that the question of whether an institution is acting as a "federal board, commission or other tribunal" in a given set of circumstances is one that has to be resolved on a case-by-case basis, having regard to both the status of the organization in question and the nature of the power being exercised in the case itself.
>
> [Emphasis added.]

[15] There are certain differences between the facts of *DRL Vacations* and the case at hand. First, in *DRL Vacations* some tendering process was undertaken. Second, in *DRL Vacations* the property at issue was to be used as a souvenir shop, not a restaurant. Third, as urged by the GSA at the hearing, the subject property here is the last remaining vacant lot on the waterfront and the construction cost will be substantial. However, none of these differences is sufficient to distinguish *DRL Vacations* from the case at hand with respect to the main question here: whether a port authority, in leasing a property for purposes unrelated to navigation, shipping, or other maritime activity, is acting as a “federal board, commission or other tribunal.” *DRL Vacations* provides an unequivocal answer to this question, and the decision is accordingly, *mutatis mutandis*, sufficient authority to allow the SJPA’s motion to strike. As in *LJP Sales*, *supra*, no further development of the factual record is required to answer the question of this Court’s jurisdiction.

[16] I would note that *DRL Vacations* was cited with strong approval in *Devil's Gap Cottagers (1982) Ltd v Rat Portage Band No. 38B*, 2008 FC 812, at para. 31.

[17] In *Anisman v Canada (Border Services Agency)*, 2010 FCA 52 (*Anisman*), the Federal Court of Appeal indicated, at para. 29, that:

> … a two-step enquiry must be made in order to determine whether a body or person is a "federal board, commission or other tribunal". First, it must be determined what jurisdiction or power the body or person seeks to exercise. Second, it must be determined what is the source or the origin of the jurisdiction or power which the body or person seeks to exercise.

Anisman does not change the holding in *DRL Vacations* insofar as it relates to the SJPA here. Justice Mactavish clearly found that the souvenir shop was a commercial enterprise and that the lease was incidental to the Halifax Port Authority's main responsibility of managing port activities relating to shipping. *DRL Vacations*, at para. 12, as well as Justice Hughes' decision in *Air Canada v Toronto Port Authority*, 2010 FC 774, at paras. 54-56, both make it clear private powers exercisable by an ordinary corporation created under a federal statute which are merely incidents of its legal personality, general powers of management, or powers relating to ordinary commercial activity are not reviewable in the Federal Court. Applying the two-step inquiry from *Anisman*, the power the SJPA is exercising is the power to lease a property for use as a restaurant, the type of private power described in *DRL Vacations* and *Air Canada*. Moving to the second step of the *Anisman* inquiry, the source of this power is the SJPA's existence as a natural person and its concomitant general powers of management. The SJPA does not derive this power from a federal statute or order, and accordingly its exercise is not subject to judicial review.

[18] In making the decision sought to be reviewed, the SJPA was not acting as a federal board, commission or other tribunal. Therefore, this Court does not have jurisdiction over the matter and the SJPA's motion to strike could be granted on this ground alone.

Standing

[19] Even if I am mistaken that the SJPA was not acting as a federal tribunal in leasing the subject property, I find that this motion to strike must be allowed on the alternative ground that the GSA lacks standing because it is not directly affected by the impugned decision. Section 18.1(1) of the *Federal Courts Act*, *supra*, limits standing to bring a judicial review application to "the Attorney General of Canada or … anyone directly affected by the matter in respect of which relief is sought."

[20] My comments above regarding the exceptional nature of a motion to strike an application for judicial review apply equally here; however, I would note that in *Canwest Mediaworks v Canada (Minister of Health)*, 2007 FC 752, aff'd 2008 FCA 207, Justice Snider held, at para. 10, that a lack of standing to bring the application is one of the exceptions to the general rule against dismissing a judicial review application on a preliminary motion.

[21] The question of an association's standing to bring an application for judicial review on behalf of its members was effectively resolved in *Independent Contractors and Business Assn v Canada (Minister of Labour)*, [1998] FCJ No 352 (*Independent Contractors*), where the Federal Court of Appeal held, at para. 31, that:

> It is true that from the outset the Association has sought to have the decision reviewed in its own right. Its interests in doing so, however, are obviously that of the members it serves including the Contractors. To borrow the words of Marceau J.A. in Canadian Transit Co. v. Canada (Public Service Staff Relations Board), [1989] 3 F.C. 611 (C.A.), at page 614, the Association's interest in the litigation is "merely indirect or contingent". …

The same can be said here. It is the members of the GSA, and not the GSA itself, who will be directly affected by the leasing of the subject property. Applying the *Independent Contractors* case to the case at hand, the GSA is not a proper vehicle through which to bring this application. I am further supported in this conclusion by Justice Snider's finding at para. 13 of *Canwest, supra*, that:

> It is generally accepted in the jurisprudence that, for an applicant to be considered "directly affected", the matter at issue must be one which adversely affects its legal rights, impose legal obligations on it, or prejudicially affect it directly … [references omitted]

Here, the GSA is not directly affected. It is, at best, indirectly affected by the hypothetical impact of the decision to lease the property on some of its members.

[22] GSA has also sought public interest standing. Given that any claim of public interest standing would essentially involve the same interest upon which it sought direct standing, that is, its commercial interest and concerns regarding competition, the comments of the Federal Court of Appeal in dismissing an appeal from Justice Snider's decision in *Canwest*, at para. 15, are directly on point:

> In this case, the Motions Judge concluded that CanWest was not "directly affected" because the harm that it alleged that the respondents' failure to enforce the law has caused to its commercial interests was too speculative and indirect. CanWest surely cannot rely on the same interest that did not qualify it for "private interest standing" to establish that it has a "genuine interest" for the purpose of public interest standing.
>
> [Emphasis added]

[23] Moreover, I agree with the SJPA that the GSA has failed to demonstrate the "genuine or direct interest in the outcome of the litigation" required for public interest standing, as per *League for Human Rights of B'Nai Brith Canada v Canada*, 2010 FCA 307, at para. 59, citing *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236. Here, the Court is lead to understand that not all of the 23 members of the GSA have an interest in the outcome of the litigation given that only a handful of the members are in the food service business, with the remainder operating bars. The subject property is not being leased for the purpose of operating a bar.

[24] I would also note, as stressed by the SJPA, that although the GSA suggests that no other party directly affected by the SJPA's decision to lease land will challenge the decision, the GSA has failed to identify any other party that might be directly affected by the decision. Furthermore, this submission that no other party directly affected will challenge the decision is at odds with the GSA's own submission that granting the GSA standing would avoid a multiplicity of proceedings.

[25] Based on the above, I find that the GSA's lack of standing is an alternative ground for allowing the SJPA's motion to strike this application.

[26] Given my findings with respect jurisdiction and standing, it is unnecessary for me to deal with the SJPA's argument that this application is time barred.

[27] For the reasons noted above, the SJPA's motion to strike this application will be allowed, the whole with costs in accordance with the mid-column of Tariff B.

ORDER

The SJPA's motion to strike is allowed, the whole with costs in accordance with the mid-column of Tariff B.

"Richard Morneau"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-345-11
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