

Federal Court



Cour fédérale

Date: 20120316

Docket: T-1494-11

Citation: 2012 FC 321

Ottawa, Ontario, March 16, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

**TOTAL OILFIELD RENTALS LIMITED
PARTNERSHIP INC**

Respondent

REASONS FOR ORDER AND ORDER

1. There are two separate motions before this Court related to this application for judicial review;
2. The Applicant, the Attorney General of Canada (Canada), brings forth a first motion pursuant to Rule 369 of the *Federal Court Rules* (SOR/98-106), to set aside on limited consent the decision rendered on August 16, 2011, by Mr. Jean-Pierre Aubre, an Appeals Officer of the

Occupational Health and Safety Tribunal of Canada concerning the appeal under subsection 146(1) of the directions issued by Health and safety Officers Dawn MacLeod and Lisa Pan. The Respondent, Total Oilfield Rentals Limited Partnership Inc (Total), agrees with Canada on this first motion that the decision must be set aside and returned to the Occupational Health and Safety Tribunal of Canada (the Tribunal), because it was made without the proper notice being given as provided for by section 57 of the *Federal Courts Act* (RSC 1985, c F-7 as modified), but leaves the matter to the Court to decide whether it should be returned to a different Appeals Officer as requested by Canada;

3. Total has also filed a motion pursuant to Rule 369 of the *Federal Court Rules* (SOR/98-106), staying the referral of this matter back to an Appeals Officer of the Tribunal until a decision is rendered in an application brought by Total in the Court of Queen's Bench of Alberta for a determination of whether Total is subject to federal or provincial regulation based on its position that it is a provincial undertaking to which provincial legislation applies;

4. Canada disputes this second motion for a stay arguing that the appropriate two prong test for a stay as set out in *Tractor Supply Co. of Texas, LP v TSC Stores L.P.*, 2010 FC 883, [*Tractor Supply*], affirmed by the Federal Court of Appeal in 2011 FCA 46, is not met ;

5. **UPON CONSIDERATION** of Canada's motion record dated February 3rd, 2012, in which it is submitted that Mr. Jean-Pierre Aubre's decision is also defective as there was a failure of procedural fairness in that HSO was not advised that the Appeals Officer was considering whether Total was within federal jurisdiction, and thus no representations were made by HSO on that issue;

6. **AND UPON CONSIDERATION** of Total's motion record dated February 15th, 2012, in which it is submitted that there is no compelling reason why the matter should be referred back to a new Appeals officer because there has been no failure of procedural fairness, natural justice nor is there a reasonable presumption of bias;

7. And more importantly it is also submitted by Total that any reference back to the Tribunal be stayed pending forthcoming proceedings in the Court of Queen's Bench of Alberta because the continuation of the action will cause prejudice to Total and that a stay would not prejudice Canada.

THE COURT finds that in view of the fact that the Appeals Officer's decision was defective not only because it failed to comply with section 57 of the *Federal Courts Act* but also because the HSO was not provided the opportunity to make full representations on the issue of jurisdiction it is preferable that the matter be referred back to a different Appeals Officer.

THE COURT ALSO FINDS that Total does not meet the two prong test established in *Tractor Supply* (cited above). This Court is not convinced from the evidence adduced that Total will be prejudiced; it may be inconvenienced in that there will be a duplication of proceedings and costs associated therewith but this does not constitute a prejudice as defined by the jurisprudence. Since the ruling sought from the Court of Queen's Bench of Alberta does not rest on the same factual basis as the matter before the Tribunal, Canada could be prejudiced if a stay is granted. Furthermore the doctrine of exhaustion warrants that the process before the Tribunal be exhausted before any

intervention from the courts (Rf *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at page 12). Therefore the stay will not be granted.

ORDER

THIS COURT ORDERS THAT

1. The decision of Appeals Officer Aubre, dated August 16th, 2011, is set aside and the matter is returned for re-determination by a different Appeals Officer of the Tribunal.

2. The Respondent Total's motion for a stay of the referral pending the outcome of the proceedings before the Court of Queen's Bench of Alberta is dismissed.

The whole without costs.

“André F. J. Scott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1494-11

STYLE OF CAUSE: THE ATTORNEY GENERAL OF CANADA
v
TOTAL OILFIELD RENTALS LIMITED
PARTNERSHIP INC

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO
RULE 369**

**REASONS FOR ORDER
AND ORDER:** SCOTT J.

DATED: March 16, 2012

WRITTEN REPRESENTATIONS BY:

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Grant Stapon FOR THE RESPONDENT

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