Federal Court  Cour fédérale

Date: 20140521

Docket: T-1699-13

Citation: 2014 FC 461

Ottawa, Ontario, May 21, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE CANADIAN TRANSIT COMPANY

Applicant

and

THE CORPORATION OF THE CITY OF WINDSOR

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Federal Court of Appeal has adamantly stated in *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250:

> [101] For some, judicial review in the Federal Court is a preferred tool of first resort. They are wrong. It is a tool of last resort, available only when a cognizable administrative law claim exists, all other routes of redress now or later are foreclosed,

> ineffective or inadequate, and the Federal Court has the power to grant the relief sought.

[2] The Federal Court must not only have jurisdiction over a subject matter, but also over the parties, and jurisdiction to order a remedy sought. There is no statutory provision presented by the Applicant that would allow the Federal Court to consider its application. This Court makes reference to the Supreme Court of Canada decision, *ITO-Int'l Terminal Operators v Miida Electronics Inc*, [1986] 1 SCR 752 at paragraph 11, in respect of the requirement for a statutory provision for the Federal Court to have the jurisdiction by which to entertain a matter.

II. Introduction

[3] The Respondent has brought a motion to strike the Applicant's Notice of Application pursuant to Rule 221(1)(*a*) of *the Federal Courts Rules*, SOR/98-106, on the grounds that this Court does not have jurisdiction to hear the application. In the application, the Applicant, the Canadian Transit Company [CTC], seeks declaratory relief regarding the scope of its rights pursuant to an *Act to Incorporate the Canadian Transit Company*, SC 1921, c 57 [AICTC] and the applicability of various municipal by-laws to properties it owns in the City of Windsor.

III. Background

[4] The Applicant, the CTC, purchased 114 properties between 2004 and 2013 in the community of Olde Sandwich Towne in Windsor, Ontario, located immediately west of the Canadian side of the Ambassador Bridge. These purchases were made as part of a long standing effort to construct a second span of the Ambassador Bridge over the Detroit River. The CTC's

intention is, and has always been, to demolish the structures located on these properties in order to build the second span.

[5] In September 2013, the City of Windsor, issued repair orders in relation to the 114 vacant properties as they had become a blight on the community. The CTC appealed these orders to the Property Standards Committee.

[6] In October 2013, the Applicant filed an application to the Federal Court seeking a declaration that, among other things, the Ambassador Bridge is considered a "federal undertaking", and as such, is not subject to municipal by-laws. It is this application which the Respondent is asking the Court to strike for want of jurisdiction.

[7] On November 1, 2013, the Property Standards Committee ordered that 83 of the 114 repair orders be modified to permit demolition as requested by the CTC, and deferred the hearing of the appeals with respect to the remaining 31 properties pending a discussion between the parties. The City of Windsor appealed both orders.

[8] On appeal of the deferral order, the Property Standards Committee upheld the City of Windsor's original repair orders for the 31 properties. The CTC subsequently appealed this order.

[9] The City of Windsor's appeal in regard to the orders permitting the demolition of 83 properties was scheduled to be heard on April 7, 2014. The CTC's appeal of the order related to the 31 other properties was scheduled to be heard on April 8, 2014.

IV. Issue

[10] Should the Respondent's motion to strike the Applicant's Notice of Application be granted?

V. Analysis

[11] This Court has long held that a motion to strike an application for want of jurisdiction should be used only in exceptional cases and should only succeed if the application for judicial review is so clearly improper as to be bereft of any chance of success (*David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (CA)). The basic rule expressed in *David Bull*, and recently affirmed in *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, above, provides that:

> [47] The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success" … There must be a "show stopper" or a "knockout punch" - an obvious, fatal flaw striking at the root of this Court's power to entertain the application …

[12] Without deciding this matter on the merits, the Court is of the view that it is plain and obvious that the application lacks a reasonable cause of action and that it is bereft of any possibility of success. Even on a generous reading of the Applicant's Notice of Application, it is extremely unclear what exactly the Applicant is asking of the Court. The Applicant does not

appear to be challenging any particular decision of the City of Windsor, the Property Standards Committee, or any order of a federal board, commission or other tribunal. Rather, the Applicant appears to be simply seeking a legal opinion regarding the applicability of the AICTC from the Court.

[13] The Court does not have the statutory authority to grant such a remedy. A reference to the Court can only be sought by the Attorney General of Canada or a federal board, commission or other tribunal over which the Court otherwise exercises judicial review functions pursuant to paragraphs 18.3 (1) and (2) of the *Federal Courts Act*, RSC 1985, c F-7. It cannot be used by private applicants as a tool to obtain a declaratory judgment from this Court (*Band Council of Whitesand First Nation v Diabo*, 2011 FCA 96).

[14] In these circumstances, the Court finds that the Applicant has failed to present a cognizable administrative law claim, which qualifies as an obvious, fatal flaw warranting the striking out of the Applicant's Notice of Application (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, above).

[15] The Court also finds that it is equally unclear what legal basis the Applicant has relied upon in bringing the application to the Court. The Applicant issued the Notice of Application on the basis of paragraph 23(*c*) of the *Federal Courts Act*; however, paragraph 23(*c*) only constitutes a statutory grant of jurisdiction to the Court by the Federal Parliament. The provision does not grant any right of appeal or judicial review to an applicant, nor does it give the Court the authority to grant a declaratory remedy.

[16] The Applicant was required to file the Notice of Application in accordance with the judicial review regime set out in the *Federal Courts Act*. In particular, the Applicant was required to provide a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on (Rule 301(*e*) of the *Federal Courts Rules*). Failure to specify a proper legal basis for the Applicant's application has resulted in a further obvious, fatal flaw striking at the root of this Court's power to entertain the application (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, above at para 47).

[17] Although the Applicant may be correct that the subject matter at issue falls under paragraph 23(*c*) of the *Federal Courts Act* as a "federal undertaking", this finding alone would not be sufficient to cure the other major flaws in the Applicant's Notice of Application. The Federal Court must not only have jurisdiction over a subject matter, but also over the parties, and jurisdiction to order a remedy sought. There is no statutory provision presented by the Applicant that would allow the Federal Court to consider its application. This Court makes reference to the Supreme Court of Canada decision, *ITO-Int'l Terminal Operators v Miida Electronics Inc*, above, in respect of the requirement for a statutory provision for the Federal Court to have the jurisdiction by which to entertain a matter.

VI. Conclusion

[18] For all of the above reasons, the Respondent's motion to strike the Applicant's Notice of Application is granted. It is both plain and obvious that the Court cannot entertain the underlying application.

JUDGMENT

THIS COURT'S JUDGMENT is that the Respondent's motion to strike the Applicant's Notice of Application be granted with costs.

In that regard, as per the reasoning of Justice François Lemieux in *Pelletier v Canada (Attorney General)*, 2011 FC 1459, 402 FTR 222 at paragraph 17, the Respondent requests $25,000.00 as a lump sum which the Court has decided to award (recognizing that costs, as a whole, have been significantly higher as per the bill of costs of the Respondent on the Court file).

Obiter

This Court notes that, despite the fact that the subject matter to which reference is made by the Applicant is indicated as being within the domain of paragraph 23(*c*) of the *Federal Courts Act* as a "federal undertaking", the issue can nonetheless be adequately resolved in the context of the Applicant's ongoing litigation before the Ontario Superior Court of Justice. Rule 14.05(3)(*d*) of the *Rules of Civil Procedure*, RRO 1990, Reg 194, specifically provides that a proceeding may be brought by application to the Ontario Superior Court of Justice "where the relief claimed is the determination of rights that depend on the interpretation of a statute, order in council, regulation or municipal by-law or resolution" [Emphasis added.]. The Applicant is therefore not left without an alternate recourse in this matter.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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