Federal Court of Appeal  Cour d'appel fédérale

Date: 20171107

Docket: A-152-17

Citation: 2017 FCA 216

[ENGLISH TRANSLATION]

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
TRUDEL J.A.

BETWEEN:

LE GROUPE MAISON CANDIAC INC.

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Montréal, Quebec, on September 27, 2017.

Judgment delivered at Ottawa, Ontario, on November 7, 2017.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: PELLETIER J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Le Groupe Maison Candiac Inc. is appealing an order of Roussel J. of the Federal Court (2017 FC 30). The Federal Court dismissed the appellant's motion to amend its notice of application for judicial review, to file a supplementary record and affidavits, and to continue the proceeding as a specially managed proceeding.

[2] The appellant initially contested the legality of an emergency order made by the Governor in Council pursuant to the *Species at Risk Act*, S.C. 2002, c. 29 (SARA) on grounds of constitutionality and disguised expropriation. Through that motion, the appellant now wanted to contest the appropriateness of the making of such an order by establishing that the order is unreasonable. Although it is difficult to understand the essence of the numerous and varied proposed amendments, it appears that, according to the appellant, the order is unreasonable because the chorus frog population found on the parcels of land listed in the order and on its parcels of land in the Montérégie was not classified correctly. Therefore, the Minister of Environment and Climate Change (the Minister) was not able to recommend that an emergency order be made, and the Governor in Council could not rely on the listing of the species in the Species at Risk Public Registry in 2010 or on the Minister's recommendation.

[3] For the following reasons, I would dismiss the appeal with costs.

I. Context

[4] In 2010, the Governor in Council made an order to list the Western Chorus Frog population in the "Great Lakes / St. Lawrence – Canadian Shield" area (the Western Chorus Frog) in the Species at Risk Public Registry (*Order Amending Schedule 1 to the Species at Risk Act*, P.C. 2010-200, C. Gaz. 2010.II.240) (the Listing Order). The order applies to the chorus frog population found in the area described in the order, which includes what I will call the greater La Prairie area (the municipalities of La Prairie, Candiac and Saint-Philippe, located north of Highway 30).

[5] The appellant is a real estate development company. It was planning to build a new housing project in the Montérégie, in the greater La Prairie area.

[6] For that purpose, the appellant had obtained a certificate of authorization from the Quebec Ministère du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques, which included specific obligations for protecting the chorus frog (also described as the Western Chorus Frog) population on the appellant's parcels of land.

[7] The Minister had been examining for some time whether he should recommend that the Governor in Council make an emergency order to protect the chorus frogs in the greater La Prairie area given the many real estate developments under way there. Following a judicial review instituted by environmentalist groups, the Federal Court set aside an initial decision by the Minister because the Minister had not considered the species' recovery (subsection 80(2) of SARA). At the same time, the Federal Court pressed the Minister to decide the issue within six months of June 22, 2015 (*Centre québécois du droit de l'environnement v. Canada (Environment)*, 2015 FC 773).

[8] On December 4, 2015, the Minister decided to recommend that an emergency order be made. That decision was communicated to the public on December 5, 2015.

[9] On June 29, 2016, the Governor in Council decided to make an initial emergency order (SI/2016-36, C. Gaz. 2016.II.2487), which was to come into force on July 29, 2016. Its purpose

was to protect the Western Chorus Frog, a species listed in the Species at Risk Public Registry, against “imminent threats to its recovery” on part of the land defined in the Listing Order.

[10] Since the appellant had decided to continue with its tree clearing operations during the period between the adoption of the first order and July 29, 2016, the Governor in Council had to make, on July 8, 2016, a second emergency order (P.C. 2016-682, C. Gaz. 2016.II.1 (Extra No. 1)) (the Emergency Order), which replaced the June 29, 2016, order and which took effect immediately. It is this Emergency Order that is the subject of the application for judicial review and that prohibits certain activities, such as drainage, excavation, tree clearing and the construction of infrastructure over a large area including the appellant’s parcels of land in the greater La Prairie area.

[11] The direct effect of the Emergency Order was to prevent the appellant from completing its housing project as planned. On August 5, 2016, the appellant consequently filed an application for judicial review to challenge the Emergency Order on the basis of only two grounds: (1) the enabling provision of the Emergency Order, subparagraph 80(4)(*c*)(ii) of SARA, is *ultra vires* the federal Parliament; and (2) the Emergency Order is a disguised expropriation of the appellant’s parcels of land.

[12] In his affidavit in support of the motion to amend the notice of application, Mr. Lamothe, the appellant’s president, stated that it was only on March 10, 2017, that he was informed by a biologist, a member of a firm working for the appellant on its housing project, of the existence of several studies on the chorus frogs found in the area included in the Listing Order; these are

listed in the proposed amended notice of application. These six studies span a period that began in 2007 and that ended in 2015.

[13] Also according to Mr. Lamothe, said biologist allegedly told him that these studies establish [translation] “beyond a shadow of a doubt” that the chorus frogs living on the appellant’s parcels of land are Boreal Chorus Frogs and not Western Chorus Frogs.

[14] The appellant filed its motion on March 23, 2017. It submitted that it had been diligent by acting promptly following this [translation] “discovery”. This is vigorously contested by the respondent, who submitted abundant evidence that this taxonomic issue could have been raised in the notice of application and therefore well before March 2017. Among other things, this issue was apparently discussed at a public consultation, which the appellant was invited to and which Mr. Lamothe attended. A document entitled “Plan de conservation de la rainette faux-grillon en Montérégie” attached to Mr. Lamothe’s affidavit in support of his application filed in 2016 also deals with this issue. Other documents filed by the respondent in the Federal Court case in autumn 2016 to put the constitutional issue into context indicate that the taxonomic issue was expressly considered by the Minister and the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) (an independent organization that brings together recognized experts tasked with assessing the situation of species at risk) before the Minister decided to recommend that the Governor in Council make an order.

[15] As I have mentioned, the taxonomic issue raised by the appellant concerns the exact classification of the chorus frog population located in the specific area described in the 2010

Listing Order and therefore in the Emergency Order. In other terms, the appellant now wants the Federal Court to examine the following issues: (i) in light of new genetic and acoustic tests, is the chorus frog found in the "Great Lakes/St. Lawrence – Canadian Shield" region the Western Chorus Frog or the Boreal Chorus Frog; and (ii) what is the impact of this question on the species' listing in the Species at Risk Public Registry and in the Emergency Order?

II. Federal Court decision

[16] When the motion was filed, the application record was ready and all that was left was to file the requisition for hearing. The Federal Court dismissed the motion for amendments and the application for review must be heard on December 4, 5 and 6, 2017.

[17] According to the Court, the proposed amendments would [translation] "unduly delay the legal dispute that is presently before the Court", while [translation] "an application for judicial review is a summary procedure that should be processed in an expeditious manner" (Federal Court reasons at para. 16).

[18] In that regard, the Court noted that the proposed amendments would radically change the nature of the issues by adding a debate on the scientific relevance of the Emergency Order to the current debate (Federal Court reasons at para. 13). In addition, according to the parties, that would require filing supplementary affidavits, cross-examining various affiants and filing supplementary records by both sides (Federal Court reasons at paras. 14–15). It emphasized that the parties had indicated that they would have to appoint experts for the taxonomic issue.

[19] As for the new documents that the appellant wished to include in its supplementary record, that is, the various studies listed in its amended notice of application and its new expert opinions, the Federal Court noted that the appellant did not demonstrate that the Governor in Council had these before him when he decided to make the Emergency Order (Federal Court reasons at para. 19). With respect to the proposed expert opinions, again according to the Federal Court, it was clear that this was new evidence that did not fall under the exceptions to the general rule according to which the reasonableness of an administrative decision is determined in light of the record that was before the decision-maker (Federal Court reasons at paras. 17–18).

[20] The Federal Court then noted that the debate that the appellant seemed to wish to have was rather the fact that COSEWIC had not revised the species at risk classification under section 24 of SARA [translation] “in light of the . . . taxonomic debate” (Federal Court reasons at para. 21). It added that the Act provided for an administrative process for that purpose and that it would be [translation] “open to [the appellant] to make the submissions that are required as part of this reassessment” (Federal Court reasons at para. 21).

[21] In determining the interests of justice, the Federal Court also considered the fact that [translation] “uncertainty is currently hanging over the legality of section 80 of SARA and the authority of the Governor in Council to make emergency orders to protect wild species that are found in places other than Crown lands” and that it is “in the interests of justice that this debate is held as promptly as possible” (Federal Court reasons at para. 22).

[22] Moreover, the Federal Court allowed the respondent's argument that the uncertainty of the legality of section 80 and the authority of the Governor in Council was a prejudice that could not be compensated by awarding costs.

III. Parties' submissions

[23] Since the appellant maintains that the Federal Court did not consider all its arguments, I have decided to summarize the parties' arguments, even though it is neither relevant nor necessary to deal with each of them in my analysis.

[24] The parties agree that the Federal Court correctly stated the principles that apply to a motion to amend a notice of application. The appellant submits, however, that the Federal Court erred by applying them to both its analysis of the interests of justice and its assessment of the prejudice that would result from the amendments. Among other things, the Federal Court misconstrued the facts and ignored the appellant's argument that special case management could minimize the delay attributable to its amendments.

[25] The appellant also maintains that it could not be challenged for the lateness of its motion, for various reasons, mainly, however, because Mr. Lamothe did not have the scientific or legal training to understand the relevance of the taxonomic issue (appellant's factum at paras. 58, 61). Because of this, he did not read the document attached to his affidavit dated September 1, 2016, which addresses this issue (appellant's factum at para. 62). He also does not remember what he said at the public consultation session during which this issue was addressed (appellant's factum at para. 61). In addition, since the appellant had initially instituted its proceeding to challenge the

Emergency Order only on the basis of its legality (see the two arguments mentioned previously), it had had no reason to question the taxonomic issue, even though it was clearly discussed in several documents filed by the respondent in 2016 as part of its application for judicial review (appellant's factum at paras. 63–64).

[26] The appellant adds that the respondent did not establish any concrete prejudice. In fact, the Federal Court could decide on its application for review without dealing with the constitutional issue if it felt that the issue of disguised expropriation was determinative. The Federal Court also erred by considering this taxonomic uncertainty in both the interests of justice and prejudice analyses.

[27] The appellant submits that even though the Federal Court could conclude that it can argue its point of view as part of the administrative process under SARA, this does not change the fact that the appellant also has the right to contest the reasonableness of the Emergency Order.

[28] The appellant also claims that the Federal Court made an overriding error by concluding at paragraph 19 of its decision that it did not [translation] "establish that the Government of Canada was aware, before the Order was made, that there were likely no [Western Chorus Frogs] on the parcels of land referred to in the Order" (appellant's factum at para. 29).

[29] According to the appellant, at that stage of the proceedings, the Federal Court should have presumed the facts asserted in the appellant's amended pleading as true. In addition, the appellant's evidence clearly showed the knowledge of the federal Department of the

Environment by the fact that some of its employees participated in one of the taxonomic studies published in 2015 and that on the government website housing the Species at Risk Public Registry, COSEWIC published a report from November 2015 intended to comment on this study (James P. Bogart, Eric B. Taylor and Ruben Boles, "Western Chorus Frog (*Pseudacris triseriata*) and Boreal Chorus Frog (*P. maculata*): clarification concerning the wildlife species listed under SARA in light of recent taxonomic interpretations", November 2015) (the Bogart report) and a clarification statement dealing with the conclusion of said rapport. These documents were part of the documentation that it wanted to include in its supplementary record.

[30] Lastly, the appellant insists that the new expert opinions that it wanted to file did not seek to introduce new evidence that was not before the decision-maker, which it describes as the Government of Canada, but rather to explain in plain terms the evidence that, according to it, was already before the decision-maker. The expert opinion was also intended to establish that no one, including the Minister and COSEWIC, could conclude that the chorus frog population on the appellant's parcels of land was identified in the 2010 Listing Order, without COSEWIC immediately proceeding with a new species assessment.

[31] The respondent submits that the Federal Court did not commit an error that would justify our intervention. According to the respondent, the appellant unduly delayed filing its motion, and the proposed amendments would lead to an undue delay, given that they would require a whole new debate even though the appellant knew or should have known that it could have raised this issue starting in autumn 2016, if not before (respondent's factum at paras. 77g, 78–81). In addition, this is a collateral attack on other decisions, such as the 2010 Listing Order, which

identified the Western Chorus Frog population in the designated area including the appellant's parcels of land, and COSEWIC's decision to reassess the classification of this population in 2017–2018.

[32] The respondent notes that the appellant interpreted paragraph 19 of the Federal Court's reasons incorrectly. According to the respondent, the Federal Court's comments deal with the application for leave to file a supplementary record and affidavits (Rule 312 of the *Federal Courts Rules*, SOR/98-106). In that regard, it submits that the Federal Court had to examine whether the documents that the appellant wanted to add to the record were before the decision-maker, which it had correctly identified as being the Governor in Council.

Issues

[33] The main issue is whether the Federal Court committed a reviewable error by denying leave to amend the notice of application.

[34] The issue of whether it also erred by examining the application for leave to file a supplementary record and affidavits (Rule 312) only arises if our Court concludes that the Federal Court did err in denying leave to amend the notice of application.

IV. Analysis

[35] An appeal from a discretionary decision by the Federal Court is subject to the standards of review established by the Supreme Court in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2

S.C.R. 235; *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 at paras. 67–68; *Nov Downhole Eurasia Limited v. TLL Oilfield Consulting Ltd*, 2017 FCA 32, [2017] F.C.J. No. 141 (QL/Lexis) at paras. 6–7).

[36] As mentioned, the parties do not agree on the interpretation of paragraph 19 of the Federal Court's reasons and therefore on the issue of whether the Federal Court did in fact consider the chances of success of the new issue raised by the appellant.

[37] Even though the Court may, when deciding on a motion to amend a pleading by adding a new issue, consider whether it is clear that that issue has no reasonable chance of success, it is not obliged to deal with this issue when it does not rely on it for its conclusion. In this case, what clearly stands out from the reasons under review is that the Federal Court was not satisfied that the proposed amendments would serve the interests of justice. That conclusion is sufficient in itself to justify its decision, unless the appellant establishes that the Federal Court made a reviewable error in that regard: *Canderel Ltd. v. Canada*, [1994] 1 F.C.R. 3 (FCA) (*Canderel*); *Sanofi-Aventis Canada Inc. v. Teva Canada Ltd.*, 2014 FCA 65, 238 A.C.W.S. (3d) 846 (*Sanofi-Aventis*); *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459 (*Merck*).

[38] In addition, I agree with the respondent that in paragraph 19 of its reasons, the Federal Court dealt with the application under Rule 312. The principles on which it is relying are well established. It was required to consider that as part of an application for judicial review, the reasonableness of the administrative decision is generally assessed based on the documents that were before the decision-maker.

[39] Even though most of the proposed new allegations concern what the Minister, his department or COSEWIC knew, did or should have done, and even though the appellant describes the decision-maker as being the Government of Canada in general, the fact remains that according to the appellant, the only decision being challenged is that of issuing the Emergency Order (see also Rule 304). Under subsection 80(1) of SARA, it is the Governor in Council that makes this decision.

[40] That said, it remains to be determined whether the Federal Court erred by concluding that the proposed amendments would not serve the interests of justice.

[41] In my view, the Federal Court did not make an extricable error in law by applying the principles that it had set forth.

[42] In fact, the factors that it considered, such as the nature of the amendments, the time when the motion was filed, and the significant delays that the amendments would cause, were all relevant factors that it could consider in exercising its discretion.

[43] As our Court has said in the past, each case may require the weighing of specific factors (*Sanofi-Aventis* at para. 13; *Merck* at para. 30; *Canderel* at page 10). Therefore, the fact that the Federal Court felt that it was in the interests of justice for the constitutional issue specific to this case to be handled quickly is not an error in principle.

[44] Our Court must presume that the Federal Court read the appellant's motion, which, on the whole, was quite simple, and that if it did not deal specifically with the appropriateness of imposing special case management, it is because such a proposal had no real impact on its assessment of the delay.

[45] In this case, I believe that, given the contents of the many proposed amendments and the nature of the scientific debate they would involve, it is not surprising that the Federal Court reached this conclusion. In my view, it is highly plausible that more time would be needed to prepare the record for the amended application than had been necessary for the original application, even if the matter were specially managed.

[46] As the Federal Court suggested, the factual and technical issues would have to be addressed *de novo*. In addition to the new affidavits and cross-examinations that this would involve, if the appellant wanted to question affiants whose examination it has waved to date, such as Wildlife Officer Loïc Gingras, who confirmed the presence of Western Chorus Frogs on the appellant's parcels of land on June 23, 2016, it would have to seek leave from the Court to do so.

[47] As for the appellant's argument that its motion was not late because of Mr. Lamothe's unawareness of the existence and relevance of the taxonomic debate, it is of no help to the appellant. The Federal Court clearly indicates at paragraph 11 of its reasons that even supposing that the facts presented by the appellant were only discovered in March, it was of the opinion that it was not in the interests of justice to allow the proposed amendments.

[48] Since the appellant repeated several times before us that the taxonomic issue had been swept under the rug by COSEWIC, the Minister and her Department, I note that it is far from obvious that the evidence supports this allegation.

[49] Lastly, even though I agree with the appellant that there was no concrete evidence to suggest that the respondent would suffer prejudice, that error is not overriding, given the Federal Court's conclusion as to the interests of justice.

[50] The Federal Court had the discretion to rule on the motion before it as it did. As was mentioned, the appellant did not persuade me that the Federal Court made an extricable error in law. It also did not satisfy me that the Federal Court made a palpable and overriding error, a standard that is difficult to meet, particularly when the court of first instance is exercising its discretion on a procedural issue.

[51] As the application for leave to file a supplementary record and affidavits is moot, there is no need to deal with the parties' arguments for the purposes of this appeal.

[52] In conclusion, I would dismiss the appeal with costs.

"Johanne Gauthier"

J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE HONOURABLE MADAM JUSTICE SYLVIE E. ROUSSEL DATED APRIL 28, 2017, DOCKET NO. T-1294-16

DOCKET:	A-152-17
STYLE OF CAUSE:	LE GROUPE MAISON CANDIAC INC. v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	SEPTEMBER 27, 2017
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	PELLETIER J.A. TRUDEL J.A.
DATED:	NOVEMBER 7, 2017

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