Federal Court of Appeal | Cour d'appel fédérale

Date: 20100927

Docket: A-384-09

Citation: 2010 FCA 246

Present: **STRATAS J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

RUDY QUADRINI

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 27, 2010.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] This application for judicial review concerns a decision made by the Public Service Labour Relations Board. The Board has brought a motion seeking leave to intervene under Rule 109 of the *Federal Courts Rules*.

[2] The applicant, the Attorney General of Canada, concedes that the Board has a right to intervene in this application. This is an appropriate concession. Under the *Public Service Labour Relations Act*, S.C. 2003, c. 22, the Board has a statutory right to intervene:

51. (1) Subject to this Part, every order or decision of the Board is final and may not be questioned or reviewed in any court, except in accordance with the *Federal Courts Act* on the grounds referred to in paragraph 18.1(4)(*a*), (*b*) or (*e*) of that Act.	**51.** (1) Sous réserve des autres dispositions de la présente partie, les ordonnances et les décisions de la Commission sont définitives et ne sont susceptibles de contestation ou de révision par voie judiciaire qu'en conformité avec la *Loi sur les Cours fédérales* et pour les motifs visés aux alinéas 18.1(4) *a*), *b*) ou *e*) de cette loi.
(2) The Board has standing to appear in proceedings referred to in subsection (1) for the purpose of making submissions regarding the standard of review to be used with respect to decisions of the Board and the Board's jurisdiction, policies and procedures.	(2) La Commission a qualité pour comparaître dans les procédures visées au paragraphe (1) pour présenter ses observations à l'égard de la norme de contrôle judiciaire applicable à ses décisions ou à l'égard de sa compétence, de ses procédures et de ses lignes directrices.

[3] Accordingly, the Board will be granted leave to intervene in this judicial review proceeding.

A. The central issue in this motion: what limits should be placed on the arguments to be made by the Board?

[4] The Board requests only the right to file an intervener's memorandum of fact and law. But what arguments can the Board make in that memorandum? The Board recognizes that it has already spoken in its decision and, as a result, it should be subject to limits on what it can say in the judicial review of that decision. However, the Board and the Attorney General of Canada disagree on how far those limits should go.

B. The issues in this application for judicial review

[5] This judicial review concerns a decision that the Board made during a hearing into an unfair labour practice complaint: 2009 PSLRB 104. Mr. Quadrini made the complaint against the Canada Revenue Agency and one of its assistant commissioners.

[6] During the hearing, Mr. Quadrini sought disclosure of a particular document. The Canada Revenue Agency and the assistant commissioner refused to disclose it. They submitted that the document was protected by solicitor-client privilege. Further, they submitted that the Board has neither the power to investigate whether the document is subject to solicitor-client privilege nor the power to order that the document be disclosed.

[7] The Board rejected these submissions. It ordered that the Canada Revenue Agency and the assistant commissioner provide the Board with an affidavit describing the contents of the document and the reasons why the document is privileged.

[8] In this judicial review, the Attorney General seeks to set aside the Board's order, making submissions similar to those that the Canada Revenue Agency and the assistant commissioner made to the Board. The only respondent is Mr. Quadrini, who is not presently represented by counsel. Mr. Quadrini did not make any submissions on this motion.

C. The Board's submissions on this motion

[9] The Board asks only to file written submissions in the judicial review. It says that its submissions, informed by its specialized knowledge and expertise, will assist this Court. It also says that this Court's decision in the judicial review will directly affect the Board's practice and procedure. It adds that, at present, no party before this Court will present the Board's "unique point of view."

[10] As for the Board's "unique point of view," the Board says very little and at an unhelpful level of generality. In its notice of motion, the Board proposes to make submissions in the judicial review on "the appropriate procedure to deal with a claim of solicitor-client privilege" and "the importance of efficient rules of procedure to the functioning of the Board." It gives no explanation of the relevance of these submissions to the judicial review, contrary to Rule 109(2).

[11] In its written submissions in support of its motion, the Board says that it will "clarify exactly what is at issue before the Court in this matter" but it is silent about exactly what clarification is needed. It says that it does not agree with all of the legal positions taken by the Attorney General of Canada but it is silent about what the issues of disagreement are. The most particular statements offered by the Board about the proposed submissions are as follows:

(a) "procedural considerations need to be taken into account in deciding how a quasi-judicial tribunal should deal with a claim of solicitor-client privilege";

(b) “there is a public interest” in the “expeditious resolution of the issues that arise before the Board”;

(c) Board proceedings should not be interrupted while privilege issues are dealt with elsewhere, with resulting costs and delays;

(d) in its order, the Board adopted the least intrusive means to investigate the existence of the privilege without breaching it; and

(e) the manner in which the Board handles solicitor-client issues will have a direct impact on the Board’s operations and procedures.

[12] The Board has not asked to respond to the legal submissions made by the Attorney General of Canada concerning the standard of review, and whether the decision of the Board should be quashed on the basis of that standard of review. Further, putting aside the matters described above, the Board has not asked to address in a broad way the legal issue of whether it had the express or implied power to do what it did.

D. The response of the Attorney General of Canada

[13] Noting the lack of particularity in the Board's proposed submissions, the Attorney General of Canada warns that the Board may seek in this judicial review to defend the correctness of its decision, enter deeply into the merits of the decision, and supplement the reasons for decision that it has already given. It adds that the sole issue in this judicial review is one of statutory interpretation, suggesting that many of the Board's proposed submissions are irrelevant or not useful. It says that the legal principles that govern the scope of intervention by tribunals require that the Board's participation in this judicial review be significantly restricted. On its view of the legal principles, it says that the Board should be allowed only to attend at the hearing to respond to any technical questions posed by the Court concerning the Board's jurisdiction and procedures.

E. The legal principles that govern the scope of intervention by tribunals

(1) Subsection 51(2) of the Act

[14] Subsection 51(2) of the Act, set out above, allows the tribunal to make submissions regarding "the standard of review to be used with respect to decisions of the Board and the Board's jurisdiction, policies and procedures." Existing alongside subsection 51(2) of the Act are two common law restrictions on the scope of the submissions a tribunal can make in a judicial review proceeding. The words of subsection 51(2) do not oust these two common law restrictions.

(2) The common law restrictions on the scope of the submissions a tribunal can make on judicial review

[15] The first restriction is common to all parties in applications for judicial review: the submissions must be relevant to the issues in the judicial review and useful to the Court. Useful includes the concept that the intervener will do more than simply restate what others will be arguing, for example "by assisting the Court by bringing an additional or a different perspective to the proceeding": *Chrétien v. Canada (Attorney General)*, 2005 FC 591 at paragraph 19, 273 F.T.R. 219, *per* Prothonotary Aronovitch. This Court can enforce standards of relevance and usefulness based on its power to control its own processes and Rule 109.

[16] The second restriction aims at careful regulation of the tribunal when it appears as a party or as an intervener on judicial review. This careful regulation is grounded on two fundamental principles in the common law:

(a) *The principle of finality*. Once a tribunal has decided the issues before it and has provided reasons for decision, absent a power to vary its decision or rehear the matter, it has spoken finally on the matter and its job is done: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. A judicial review is not an opportunity for the tribunal to amend, vary, qualify or supplement its reasons. Accordingly, attempts by the tribunal to speak further by making submissions in the judicial review have to be carefully regulated.

(b) *The principle of impartiality.* When a court allows an application for judicial review, it has a broad discretion in the selection and design of remedies: *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6. One remedy, quite common, is to remit the matter back to the tribunal for redetermination. If that happens, the tribunal must redetermine the matter, and appear to redetermine it, impartially, with an open mind. Submissions by the tribunal in a judicial review proceeding that descend too far, too intensely, or too aggressively into the merits of the matter before the tribunal may disable the tribunal from conducting an impartial redetermination of the merits later. Further, such submissions by the tribunal can erode the tribunal's reputation for evenhandedness and decrease public confidence in the fairness of our system of administrative justice. In the classic words of the Supreme Court of Canada in *Northwestern Utilities Ltd. and al. v. Edmonton*, [1979] 1 S.C.R. 684 at page 709:

> Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.

[17] In engaging in careful regulation based on the principles of finality and impartiality, courts have made a number of general statements. For example, tribunals should not make submissions to the reviewing court that, in substance, amend, vary, qualify or supplement the reasons for decision of the tribunal: *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen*

Construction Ltd., 2002 NBCA 27 at paragraphs 26 and 33, 39 Admin. L.R. (3d) 1. Courts should not allow tribunals to participate in judicial reviews when they bring to bear no particular expertise on the issue, when their jurisdiction and power is not in issue, and when they have had ample opportunity to express themselves in their reasons: *Ferguson Bus Lines v. Amalgamated Transit Union, Local 1374* (1990), 68 D.L.R. (4th) 699 at pages 702-703 and 708, 108 N.R. 293 (F.C.A.), leave to appeal to the SCC refused, [1990] S.C.C.A. No. 223. Tribunals should not descend into the merits of the case or make arguments that go to the heart of the litigation stemming from their decisions: *Li v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 267 at paragraph 5, 327 N.R. 253, leave to appeal to SCC refused, [2005] S.C.C.A. No. 119; *Bell Canada v. Communications, Energy and Paperworkers Union of Canada,* [1998] F.C.J. No. 1141, 82 A.C.W.S. (3d) 1107 (F.C.A.). However, tribunals can make submissions on judicial review about whether they had jurisdiction to make their decisions and what the appropriate standard of review should be: *Canadian Association of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.,* [1989] 2 S.C.R. 983; *Northwestern Utilities, supra* at page 709. Further, tribunals can make submissions explaining the evidentiary record or the procedures that they followed: *Paccar*, *supra*; *Northwestern Utilities Ltd.*, *supra* at page 709; *Genex Communications Inc. v. Canada (Attorney General)*, 2005 FCA 283 at paragraph 65, 260 D.L.R. (4th) 45, leave to appeal to SCC refused, [2005] S.C.C.A. No. 485. Finally, some courts have recognized that where a tribunal's submissions are necessary and useful, and there are no other concerns about the tribunal's participation, the tribunal can be allowed to review the evidence in the case with a view to showing that its decision should be upheld as reasonable: *Children's Lawyer for Ontario v. Goodis* (2005), 75 O.R. (3d) 309 at paragraphs 21 to 24 (C.A.); *Paccar, supra* at page 1016. Often "the tribunal is

in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area": *British Columbia Government Employees' Union v. British Columbia (Industrial Relations Council)* (1988), 32 Admin. L.R. 78, 26 B.C.L.R. (2d) 145 (B.C.C.A.), cited with approval in *Paccar*, *supra* at page 1016.

[18] However, these general statements have to be seen, and increasingly are seen, not as hard and fast rules but rather as exercises of discretion based on particular circumstances. A couple of examples illustrate this:

(a) As we have seen in paragraph 17, above, some courts have ruled that a tribunal, defending its decision under reasonableness review, can come close to or touch on the merits by discussing the evidence and the conclusions that the tribunal could reasonably draw from the evidence. But later cases show that this is not a hard and fast rule. On occasion, courts have found that tribunals have descended too far into the task of defending the substantive merits of the administrative case, offending the principles of finality and impartiality: see, for example, the concerns expressed by my colleague, Justice Pelletier, in *Air Canada v. Canada (Canadian Transportation Agency)*, 2008 FCA 168 at paragraph 11, 82 Admin L.R. (4th) 225 and see also *United Brotherhood*, *supra*, at paragraph 31.

(b) There is further difficulty associated with a tribunal defending its decision under reasonableness review. The Supreme Court has told us that a decision can be upheld on the basis of the "reasons…which could be offered in support of a decision" and not just on the basis of the reasons themselves: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 48, [2008] 1 S.C.R. 190. Submissions by a tribunal about what reasons could have been offered by the tribunal come dangerously close to amending, varying, qualifying or supplementing the reasons for its decision, thereby offending the finality principle. Courts, using their discretion, will have to impose limits on just how far a tribunal can go, if at all, with this sort of submission.

[19] I note that the Court of Appeal for Ontario in *Children's Lawyer for Ontario*, *supra*, has held that the general statements in the case law are not hard and fast rules, and that this is an area for the exercise of judicial discretion. That Court regarded previously decided cases "as sources of the fundamental considerations that should inform the court's discretion in the context of a particular case" rather than as "a set of fixed rules": *Children's Lawyer for Ontario, supra* at paragraphs 35 and 43; *Canada (Attorney General) v. Canada (Human Rights Tribunal),* (1994) 76 F.T.R. 1 at paragraph 49, 19 Admin. L.R. (2d) 69 (T.D.); David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at page 459.

[20] I agree with this approach. In my view, the discretion as to the permissible scope of a tribunal's submissions on a judicial review of its own decision should be based on:

(a) an appreciation of the issues that will arise in the reviewing court;

(b) an assessment of the relevance and usefulness of the tribunal's proposed submissions to the determination of those issues; and

(c) a consideration of whether, and the extent to which, the principles of finality and impartiality will be offended by the tribunal's proposed submissions.

The Court's exercise of discretion will also be guided by the cases summarized in paragraph 17, above, and other previously decided cases. These cases serve as examples of prudent regulation of the particular circumstances before them, based upon the principles of relevance, usefulness, finality and impartiality.

[21] It is neither necessary nor advisable at this time to enumerate all of the factors that might be relevant to this discretionary assessment and when particular factors should receive significant weight; these will emerge from future decisions involving particular circumstances. However, like the Court of Appeal for Ontario in *Children's Lawyer for Ontario*, *supra*, I found the discussion of various factors in Mullan, *supra* at pages 452-460 and Laverne A. Jacobs & Thomas S. Kuttner, "Discovering What Tribunals Do: Tribunal Standing before the Courts" (2002) 81 Canadian Bar Review 616 to be illuminating.

[22] The tribunal seeking to intervene must assist the Court in its discretionary assessment. The Court must have a fairly detailed description of the submissions that the tribunal proposes to advance and how they will assist the determination of the factual or legal issues in the judicial review. Rule 109(2) requires that this be stated in the notice of motion for intervention. Vague or sweeping descriptions of the intended submissions can create concerns that the tribunal will go too far, prompting the court to impose restrictions. In some cases, the descriptions of the proposed submissions can be so inadequate that the court has no choice but to refuse intervention: *Canada (Attorney General) v. Georgian College of Applied Arts and Technology*, 2003 FCA 123 at paragraphs 5-7, 121 A.C.W.S. (3d) 196.

[23] The Court will need the tribunal's assistance in another respect. In trying to define in advance of the hearing the extent of the tribunal's participation, the Court can only provide general limits. It cannot descend much into specifics. Therefore, counsel to the tribunal, crafting the specifics of the tribunal's submissions, not only should obey the general limits set by the Court but also should try to ensure that the detail of the submissions do not offend the rationales behind those limits, namely the principles of relevance, usefulness, finality and impartiality. This calls for circumspection and prudence.

[24] Finally, it goes without saying that the panel of the Court at the oral hearing of the application for judicial review is the master of its own proceedings and can exercise its discretion concerning the propriety of the tribunal's submissions depending on the circumstances that present themselves in the courtroom.

F. Applying the legal principles to this case

[25] At the outset, this Court again notes that subsection 51(2) of the Act entitles the Board to intervene and speak to "the standard of review to be used with respect to decisions of the Board and the Board's jurisdiction, policies and procedures." As is evident from paragraphs 10 and 11, above, the Board has proposed a somewhat narrower level of participation than is possible under subsection 51(2). Further, this Court notes that the only party presently opposing the Attorney General of Canada in this judicial review proceeding is the respondent, Mr. Quadrini, and he does not have legal representation. If this Court unduly restricts the scope of the Board's intervention in this case, the Court may be deprived of the benefit of legal counsel articulating legal submissions that respond to the legal position of the Attorney General of Canada. Without the Board present before the Court, certain relevant and useful submissions may not be made. Finally, the interests and perspectives of the Board on the issues in this judicial review are quite different from those of the Attorney General of Canada. All of these factors support a relatively favourable response to the Board's motion. Therefore, there will be a number of matters on which the Board will be permitted to make submissions in this judicial review.

[26] In this proceeding, the Court will review the Board's decision that it has the power to rule on the existence of solicitor and client privilege and to order the disclosure of documents where necessary. Putting aside any standard of review issues, I agree with the Attorney General that this is primarily an issue of statutory interpretation. The Attorney General also seems to suggest that the

task of interpreting the Board's powers under the statute is a relatively narrow one, involving an examination of the words in the statute. As a result, says the Attorney General, the scope of the Board's intervention should also be narrow.

[27] I do not accept this. In interpreting statutory provisions, this Court also examines the words of an Act "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at paragraph 26, [2002] 2 S.C.R. 559. In making submissions on these matters, often parties usefully explore the implications associated with particular interpretations and discuss whether those implications are consistent with the scheme and object of the Act and the intention of Parliament. In my view, such submissions by the Board would be relevant and useful. Further, in the circumstances of this case, such submissions by the Board would not prompt concerns regarding the principles of finality and impartiality, provided that the Board advances them with circumspection and prudence.

[28] Accordingly, the Board may explore the implications associated with this Court granting the application for judicial review and accepting the positions taken by the Attorney General in its memorandum of fact and law. However, in discussing these implications, the Board should restrict itself to its ability to have matters heard in a just, timely and orderly way, and the possible effects that granting the application for judicial review could have on the Board's operations and procedures. No other implications have been articulated with sufficient particularity.

[29] As mentioned in paragraph 11, above, the Board would also like to submit that it adopted the least intrusive means to investigate the existence of privilege without breaching it. Phrased in this way, this submission smacks of an attempt to defend the Board's decision purely on its merits or to supplement the Board's written reasons, contrary to the principles of finality and impartiality. The Board has not suggested that this is a part of a broader submission that the Board's decision should be upheld in light of the standard of review. Accordingly, the Board is not allowed to advance this submission.

[30] The remaining matters proposed by the Board, such as "clarify[ing] exactly what is at issue before the Court in this matter," are phrased too vaguely and too broadly to be considered relevant or useful to the application.

[31] Overall, this Court is concerned about the Board's rather general and vague description of its proposed submissions. There is a danger that the Board might make submissions that offend the principles of finality and impartiality. Accordingly, this Court will prohibit the Board from attempting, in substance, to amend, vary, qualify or supplement the reasons for decision of the Board. It will also prohibit the Board from embarking into the merits of the Board's decision in such a way as to call into question its ability to hear, impartially, any redetermination in the event that this matter is remitted back to it.

G. Additional terms

[32] The Board has proposed a number of additional terms in this Court's order permitting it to intervene. It proposes that it will not add to the evidentiary record or participate in any cross-examinations on affidavits, appeal any decision, or participate in any interlocutory matters except for those that pertain to its participation as an intervener. It has also agreed that it shall not seek or be awarded costs, or be subject to an award of costs against it. Finally, it has asked that its written submissions be served and filed on the parties no later than 30 days after the date of this order.

[33] The Attorney General of Canada does not oppose any of these terms. The respondent has not filed any submissions on this motion opposing these terms. This Court has the power to impose these terms under Rules 53 and 109 and considers them to be appropriate and fair. Accordingly, the Court will add these terms to its order.

[34] The Board has not asked for a right to make oral submissions. However, it would be useful for the Board to attend at the hearing of the application, to be available to answer any questions posed by the Court. Therefore, the Board may attend for that purpose if it wishes to do so.

[35] The Attorney General of Canada has submitted that if the Board is permitted to file written submissions, it should be granted a right to file a reply. It is not clear at this time whether a reply memorandum is needed. After the Board has filed its memorandum, the Attorney General may bring a motion under Rule 369 requesting a right of reply.

[36] Given the relatively narrow nature of the issues to be addressed by the Board, the Board's memorandum of fact and law shall be limited to 15 pages, exclusive of schedules.

[37] If the applicant or the respondent form the view that the Board's memorandum of fact and law contains impermissible submissions, the parties (including the Board) may serve and file submissions of no more than two pages in length on this issue. The panel hearing the judicial review may determine the matter.

[38] Nothing in the order or these reasons should be taken to interfere with the discretion of the panel hearing this judicial review to rule on the propriety of any of the tribunal's submissions or to invite further submissions from the tribunal. The panel is free to regulate the involvement of the tribunal as it sees fit based on the circumstances that present themselves.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-384-09
STYLE OF CAUSE:	Attorney General of Canada v. Rudy Quadrini

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	Stratas J.A.
DATED:	September 27, 2010

WRITTEN REPRESENTATIONS BY:

Pierre Hamel	FOR THE PROPOSED INTERVENER
Caroline Engmann	FOR THE APPLICANT

SOLICITORS OF RECORD:

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