Federal Court of Appeal  Cour d'appel fédérale

Date: 20190418

Docket: A-60-18

Citation: 2019 FCA 94

CORAM: **PELLETIER J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

COMMUNITIES AND COAL SOCIETY,
VOTERS TAKING ACTION ON CLIMATE CHANGE,
CHRISTINE DUJMOVICH AND PAULA WILLIAMS

Appellants

and

VANCOUVER FRASER PORT AUTHORITY AND
FRASER SURREY DOCKS LIMITED PARTNERSHIP

Respondents

Heard at Vancouver, British Columbia, on November 8, 2018.

Judgment delivered at Ottawa, Ontario, on April 18, 2019.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

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

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] The appellants have appealed from a judgment of the Federal Court issued by Justice O'Reilly (the judge) dated January 15, 2018, which dismissed their application for judicial review of two decisions of the respondent Vancouver Fraser Port Authority (the Port Authority) approving a proposal from the other respondent, Fraser Surrey Docks Limited Partnership (FSD),

to build a coal transfer facility at a marine terminal in Surrey, British Columbia (FSD Project). The judge found that these decisions were made fairly and lawfully, and were untainted by a reasonable apprehension of bias.

[2] At issue was the approval by the Port Authority, following an environmental assessment, of the construction and operation of a transfer facility to bring coal from the United States by rail, into the terminal in Surrey, British Columbia, and to load it onto ocean-going vessels bound for Asia. Both before this Court and the court below, the appellants did not challenge the reasonableness of the Port Authority's decisions. Rather, the main issue was whether the Port Authority's bonus scheme raises a reasonable apprehension of bias with respect to its decisions to approve the FSD Project. The argument was that, to the extent that the CEO and VP of the Port Authority were granted bonuses based on their individual performances measured against certain predetermined objectives, the bonus scheme provided the employees of the Port Authority with a pecuniary incentive to approve the FSD Project.

[3] On January 30, 2019, the Port Authority wrote to FSD to cancel the permit allowing the coal transfer facility. That decision was taken because FSD was not in compliance with basic conditions of the permit, and in particular with condition 81, pursuant to which it was incumbent upon FSD to demonstrate substantial progress on construction of the FSD Project prior to November 30, 2018 to the satisfaction of the Port Authority. Upon learning of that decision through media reports, the Court issued a Direction on March 1, 2019, seeking the parties' views as to the mootness of this appeal.

[4] The appellants and the Port Authority agree that the case is moot, as there is no live controversy remaining between the parties. The permit that was the subject of the underlying judicial review application has been cancelled, and as a result, the outcome sought by the appellants has been obtained.

[5] The appellants, however, ask this Court to exercise its discretion to nevertheless hear and determine the appeal on the merits. The respondent Port Authority does not deny that the Court has such a discretion, but argues that the circumstances do not warrant the exercise of that discretion in the case at bar. As for the respondent FSD, it has decided not to take a position on this issue.

[6] In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231, the Supreme Court set out the policy considerations that a court should bear in mind when deciding whether or not to exercise its discretion to hear a moot case. They can be summarized as follows:

- The presence of an adversarial relationship;
- The need to promote judicial economy; and
- The sensitivity for the role of the court as the adjudicative branch of the government.

[7] Having carefully considered these factors, I am of the view that the Court should not exercise its discretion to decide this appeal. First of all, as mentioned above, it is clear that there is no longer an adversarial relationship since the appellants have achieved the result they were seeking.

[8] Moreover, a decision by the Court on the merits of the appeal would be of no practical use to the parties. FSD has declined to judicially review the Port Authority's decision to revoke the permit, and has indicated it has no interest, for the time being, in submitting a new application. It is therefore pure speculation to argue that the matter could be the subject of further litigation, at least in the near future. And in any event, as I will explain below, the issues raised in this appeal will not evade judicial review.

[9] Of course, I am mindful of the fact that the parties have already invested significant resources into preparing for the appeal, that this litigation took almost three and a half years in the court below, and that the hearing before this Court has already taken place. However, these are not sufficient reasons for this Court to render what would be, for all intents and purposes, an opinion on a reference under the guise of an appeal. Contrary to what the appellants submit, a decision of the Court would be of little precedential value on the issues raised and would provide little guidance on the link between a bonus scheme and a reasonable apprehension of bias. By their very nature, allegations that a particular set of circumstances raises a reasonable apprehension of bias call for a determination that is heavily fact dependent (*Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259 at para. 77). I appreciate that there are a number of Crown corporations and port authorities where executives receive compensation based on bonus schemes and incentive plans that may, in some respect, be similar to that of the executives here. This does not detract from the principle that each case turns on its own facts, especially when dealing with such a context-specific notion as a reasonable apprehension of bias.

[10] Finally, I am comforted by the fact that the issues raised by the appellants are not of the type that will evade judicial review. As pointed out by counsel on both sides, the Port Authority regularly engages in decision making leading to the issuance of permits, in accordance with its statutory obligations contained in the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52. Given the volume of the Port Authority's decision making with respect to project permits, and the number of other port authorities or Crown corporations who allegedly make regulatory decisions against a backdrop of similar compensation schemes, it is a fair assumption that there will be ample opportunity for future judicial review and guidance on the type of issues raised by the appellants in the court below.

[11] For all of the above reasons, I am of the view that this appeal is moot and that we should not exercise our discretion to decide the matter. There is no reason to depart from the usual practice in situations like this that each party should bear their own costs of this appeal. I would therefore dismiss this appeal, without costs.

"Yves de Montigny"
J.A.

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

"I agree
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-60-18
STYLE OF CAUSE:	COMMUNITIES AND COAL SOCIETY, VOTERS TAKING ACTION ON CLIMATE CHANGE, CHRISTINE DUJMOVICH AND PAULA WILLIAMS v. VANCOUVER FRASER PORT AUTHORITY AND FRASER SURREY DOCKS LIMITED PARTNERSHIP
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	NOVEMBER 8, 2018
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	PELLETIER J.A. GLEASON J.A.
DATED:	APRIL 18, 2019

APPEARANCES:

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