Federal Court of Appeal | Cour d'appel fédérale

Date: 20210303

Docket: A-306-20

Citation: 2021 FCA 41

Present: LASKIN J.A.

BETWEEN:

VITERRA INC.

Appellant

and

GRAIN WORKERS' UNION LOCAL 333 ILWU

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 3, 2021.

REASONS FOR ORDER BY: LASKIN J.A.

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REASONS FOR ORDER

LASKIN J.A.

I. Introduction

[1] Two stay motions have been brought in this appeal. The first is a motion by the appellant, Viterra, to stay a contempt proceeding in the Federal Court pending disposition of this appeal. The second is a motion by the respondent, the Union, to stay this appeal pending disposition of the contempt proceeding. For the reasons set out below, I am dismissing Viterra's motion and granting the Union's.

II. Procedural history

[2] The dispute between the parties has a lengthy procedural history.

[3] Viterra operates two grain terminals in the Port of Vancouver. The Union is certified under the *Canada Labour Code*, R.S.C. 1985, c. L-2, to represent employees at the terminals. In July 2017, the Union filed two policy grievances alleging that Viterra was allowing employees to work more than 48 hours per week, in violation of the Code.

[4] An arbitrator was appointed to hear the grievances. Viterra objected to the arbitration on various grounds, including the arbitrator's jurisdiction. It asserted that enforcement of the hours of work provisions of the Code was within the exclusive jurisdiction of inspectors appointed under the Code.

[5] In December 2017, the arbitrator issued an award finding that he had jurisdiction. Viterra sought judicial review of the award in the Supreme Court of British Columbia. It was unsuccessful. Its appeal to the British Columbia Court of Appeal was dismissed.

[6] The arbitrator issued his award on the merits in October 2019. He found that Viterra was in contravention of the Code, and issued a cease and desist order. He left it to the parties to try to work out an averaging agreement, as provided for in the Code. He remained seized to resolve any dispute arising out of enforcement of his award.

[7] Viterra sought clarification of the award. In November 2019, the arbitrator clarified that there was no evidence before him concerning, and he did not address, circumstances occurring after the date of the grievance.

[8] In May 2020, the parties attended before the arbitrator to try to reach an averaging agreement. They were unable to do so. The arbitrator issued a letter decision stating that his jurisdiction was now exhausted.

[9] In November 2019, the Union filed the arbitrator's decision with the Federal Court. In August 2020, it commenced a contempt proceeding in the Federal Court against Viterra, and the Federal Court subsequently issued an *ex parte* show cause order directing Viterra to appear before the Court on October 20, 2020.

[10] Viterra responded by serving and filing a motion record raising a number of preliminary legal and procedural objections to the contempt proceeding. It alleged, among other things, that the filing of the arbitrator's award did not comply with the requirements of the Code, and that the award was not capable of enforcement.

[11] The parties then participated in a case management conference before Gleeson J. of the Federal Court. He made an order bifurcating the contempt proceeding, so that Viterra's preliminary objections would be heard first, and the evidentiary portion of the proceeding, at a later date.

[12] Justice Gleeson issued his order and reasons dismissing Viterra's preliminary objections on November 30, 2020. This is the order under appeal: Viterra filed a notice of appeal in December 2020. The evidentiary portion of the contempt proceeding has now been scheduled to proceed on March 23 to 25, 2021.

[13] The hearing of the appeal has not yet been scheduled. The appeal book was filed on January 27, 2021, Viterra's memorandum of fact and law, on February 1, 2021, and the Union's memorandum, on March 2, 2021. Viterra can now (absent a stay order) file a requisition for hearing.

III. Viterra's motion

[14] Viterra brings its motion under paragraph 50(1)(b) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which authorizes this Court to stay proceedings in a cause or matter where it is in the interests of justice that the proceedings be stayed.

[15] As Viterra recognizes, to succeed in its motion it must satisfy all three parts of the three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 at 314-315. It must show that (1) its appeal raises a serious issue; (2) it will suffer irreparable harm if a stay is not granted; and (3) the balance of convenience favours granting a stay. I need only consider the second, irreparable harm part of the test to conclude that the motion fails.

[16] In submitting that it will suffer irreparable harm if a stay is not granted, Viterra relies exclusively on the harm it asserts it will suffer from having to participate in a hearing that will

render its appeal moot or nugatory. It refers to case law to the effect that, where an appeal may be rendered moot or nugatory unless a stay is granted, there is a rebuttable presumption that irreparable harm is inevitable; see, for example, *RDX Technologies Corporation v. Appel*, 2019 ABCA 338 at para. 17.

[17] As the Union points out, this Court has held in a number of cases that the mere fact that an appeal will be rendered moot does not necessarily establish irreparable harm: *eBay Canada Limited v. Canada (National Revenue)*, 2008 FCA 141 at para. 33; *Merchant (2000) Ltd. v. Canada*, 2009 FCA 280 at para. 5; *Novopharm Limited v. Pfizer Canada Inc*., 2010 FCA 258 at 12; *Double Diamond Distribution Ltd. v. Crocs Canada, Inc.*, 2019 FCA 243 at paras. 10-11.

[18] But leaving this case law aside, there is a more fundamental reason why Viterra fails to establish irreparable harm. The premise for its submission on this point – that its appeal will be rendered moot or nugatory if no stay is granted – is not made out.

[19] If Viterra is found in contempt, it will remain open to it to pursue its appeal to this Court. If it succeeds in showing on appeal that the Federal Court erred in dismissing Viterra's preliminary objections to the contempt proceeding, this Court will have available to it all of the remedies set out in paragraph 52(b) of the *Federal Courts Act*, including giving the judgment the Federal Court should have given. Viterra will also be able to commence a further appeal attacking the Federal Court's conclusion in the second, evidentiary phase of the contempt proceeding. That appeal could be heard together with the current appeal, subject to the discretion of the Court.

[20] In these circumstances, Viterra's appeal will not be moot or nugatory, and it will suffer no irreparable harm from refusal of the stay. I acknowledge that Viterra's appeal could be moot if it succeeds in defending the contempt proceeding on the merits: there would then be no need to proceed with the appeal. But in that event, there would be no irreparable harm to it either.

[21] Viterra's stay motion is accordingly dismissed with costs.

IV. The Union's motion

[22] The Union's motion is also brought under paragraph 50(1)(b) of the *Federal Courts Act*. It seeks an order staying Viterra's appeal pending the disposition of the contempt proceeding.

[23] As the parties both recognize, the test for this Court to grant a stay of one of its own proceedings, as opposed to a proceeding in another forum, is less demanding than the *RJR* test: it is "whether, in all of the circumstances, the interests of justice support the appeal being delayed": *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc*., 2011 FCA 312 at paras. 5, 14. However, in considering the interests of justice, the Court may take into account some of the same considerations as those referred to in *RJR*: *Clayton v. Canada (Attorney General)*, 2018 FCA 1 at para. 26. The Court will also be guided by the principle set out in rule 3 of the *Federal Courts Rules*, SOR/98-106: that of securing "the just, most expeditious and least expensive determination of every proceeding on its merits": *Coote v. Lawyers' Professional Indemnity Company*, 2013 FCA 143 at para. 12.

[24] The Union submits that the interests of justice and the efficient use of judicial resources weigh heavily in favour of granting a stay. It states that the proceedings relating to the grievances it filed in July 2017 have already required it to incur "enormous expense," and that Viterra has been unsuccessful in the five substantive rulings it has pursued. Viterra's goal, the Union argues, is "to avoid and delay having [the] issue adjudicated on the merits." The Union submits that proceeding with both the appeal and the contempt proceeding would cause significant further expense to both it and the public, and that granting a stay of the appeal and allowing the contempt hearing to proceed would conserve judicial resources and cause no prejudice to Viterra.

[25] Viterra submits in response that it meets the *RJR* criteria. It argues in addition that staying the appeal would deprive it of the opportunity to challenge through the appeal the jurisdiction of the Federal Court – a challenge that could dispose of the entire matter – before the contempt proceeding is decided on the merits. It states that the preferred method for preserving judicial resources is for this Court to decide the jurisdictional issue first. It contests the Union's submission that it has already consumed enough of judicial time and resources, and submits that it is entitled to pursue its rights and the remedies available to it.

[26] In reply, the Union submits that Viterra's appeal cannot properly be described as a jurisdictional challenge, and that in any event (citing *Merchant* at para. 6), a party suffers no harm when it is left to argue jurisdiction until after arguments are made on the merits.

[27] I grant the Union's motion. In my view, staying the appeal pending disposition of the contempt proceeding in the Federal Court will promote the interests of justice. As I have noted

above, if Viterra succeeds on the merits of the contempt motion, there will be no need for it to pursue the appeal, and no need for the parties or the Court to devote further resources to it. If it fails on the merits, the appeal can be reactivated, and heard together with an appeal (which it appears would inevitably be brought) of the further determinations made by the Federal Court following the evidentiary phase of the contempt proceeding. On that scenario, this Court would have the entire case before it on appeal. I see no prejudice to Viterra in having to argue the merits of the contempt proceeding before arguing the preliminary issues it raises in the current appeal.

[28] For these reasons, the Union's motion is granted with costs, as requested, in the cause. I will include in my order provision for the parties to notify the Court once the contempt proceeding in the Federal Court has been decided.

"J.B. Laskin"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-306-20
STYLE OF CAUSE:	VITERRA INC. v. GRAIN WORKERS' UNION LOCAL 333 ILWU

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	LASKIN J.A.
DATED:	MARCH 3, 2021

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