Federal Court of Appeal | Cour d'appel fédérale

Date: 20241010

Docket: A-10-22

Citation: 2024 FCA 167

CORAM: **BOIVIN J.A.**
ROUSSEL J.A.
GOYETTE J.A.

BETWEEN:

SIERRA CLUB CANADA FOUNDATION
and WORLD WILDLIFE FUND CANADA

Moving Parties /Appellants

and

ECOLOGY ACTION CENTRE

Appellant

and

MINISTER OF ENVIRONMENT AND CLIMATE CHANGE
and
THE ATTORNEY GENERAL OF CANADA

Respondents

and

LE CONSEIL DES INNU DE EKUANITSHIT and
THE ATTORNEY GENERAL OF ONTARIO and
THE ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR

Interveners

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 10, 2024.

REASONS FOR ORDER BY: THE COURT

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REASONS FOR ORDER

[1] Sierra Club Canada Foundation and World Wildlife Fund Canada move for an order under Rule 399(2)(*a*) of the *Federal Courts Rules*, SOR/98-106, setting aside this Court's judgment of May 3, 2024 (2024 FCA 86). The Court's judgment dismissed the appeal.

[2] For the following reasons, the motion is dismissed with costs.

I. Background to the motion

[3] The appeal concerned issues under the *Impact Assessment Act*, S.C. 2019, c. 28. The Act requires the Minister of Environment and Climate Change to consider a regional assessment before exercising his power under the Act. That assessment was completed in early 2020, and a report was released in March 2020. On June 3, 2020, after considering the assessment, the Minister, by regulations, excluded certain offshore oil and gas exploratory drilling activities east of Newfoundland and Labrador from project-specific assessments: *Regulations Respecting Excluded Physical Activities (Newfoundland and Labrador Offshore Exploratory Wells)*.

[4] The appellants then twice applied for judicial review in the Federal Court. In one application, they challenged the report's validity. In the other, they challenged the regulations' validity. The Federal Court dismissed both applications: 2021 FC 1367. It found that judicial review was not available for the report. It further found the regulations reasonable because (1) they were consistent with the Act's purpose, (2) they were within the regulation-making power

in the Act, and (3) they met the Act's condition precedent, since they were made after the Minister considered an assessment that was not materially deficient.

[5] The appellants appealed to this Court. They raised four issues: (1) the report's amenability to judicial review; (2) the assessment's reasonableness; (3) the procedural fairness of the assessment; and (4) the reasonableness of the Minister's decision to make the regulations. Issues (2), (3) and (4) were related to the validity of the regulations: when an assessment of this sort is materially deficient (unreasonable or procedurally unfair)—lack of deficiency being a prerequisite for the making of a regulation—the regulation may be quashed: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 at para. 201; *Mikisew Cree First Nation v. Canadian Environmental Assessment Agency*, 2023 FCA 191 at paras. 108–109.

[6] After this Court heard the appeal, but before it issued its judgment, the Supreme Court of Canada released a decision on the constitutionality of the Act: *Reference re Impact Assessment Act*, 2023 SCC 23. In it, the Supreme Court held that the entire Act was unconstitutional, with the exception of a few provisions not relevant to this appeal.

[7] On May 3, 2024, this Court dismissed the appeal with costs. Like the Federal Court, this Court found that the report was not subject to judicial review. However, given the Supreme Court's opinion that the Act was invalid, and because a regulation cannot be founded on an invalid statute, the Court determined that the regulations were invalid. On that basis, the Court decided that issues (2), (3) and (4)—all connected to the validity of the regulations—were moot.

[8] After this Court's judgment, the *Budget Implementation Act, 2024, No. 1*, S.C. 2024, c. 17 received Royal Assent, and brought into force amendments to the Act prompted by the Supreme Court's decision. Three provisions of the *Budget Implementation Act, 2024, No. 1* are germane to the motion before this Court. They are reproduced in the appendix to these reasons. First, subsection 309(2), read in conjunction with subsection 302(1), says that if a committee established by the Minister to conduct an assessment has, before June 20, 2024, provided a report to the Minister, the report is deemed to be a report provided under the amended Act. Second, section 318, also read in conjunction with subsection 302(1), provides that the regulations "are deemed to be made by the Minister" under the amended Act on June 20, 2024, and to come into force on that date. Finally, section 318 provides that the Minister is deemed to have considered an assessment that is in relation to the activities designated in the regulations.

[9] On July 26, 2024, the moving parties filed a motion seeking an order pursuant to Rule 399(2)(*a*). The moving parties ask this Court to set aside the portions of the judgment that determined that issues (2), (3) and (4) were moot.

II. Analysis

[10] Rule 399(2)(*a*) confers discretion on the Court to vary or set aside a decision "by reason of a matter ("*faits nouveaux*" in the French version) that arose or was discovered subsequent to the making of the order." However, the finality of judicial decisions means that setting aside a judgment must be based on exceptionally serious and compelling grounds: *Siddiqui v. Canada*

(Citizenship and Immigration), 2016 FCA 237 at para. 12; *Canada v. MacDonald*, 2021 FCA 6 at para. 17.

[11] Three conditions must be satisfied for the Court to set aside a decision: (1) the newly discovered information must be a "matter"; (2) the "matter" must not be one which was discoverable prior to the making of the decision by the exercise of due diligence; and (3) the "matter" must be something which would have a determining influence on the decision in question: *Ayangma v. Canada*, 2003 FCA 382 at para. 3 [*Ayangma*].

A. *The existence of a matter*

[12] This Court has held that subsequent jurisprudence of our Court or of a higher Court does not constitute a "matter that arose […] subsequent to the making of an order": *Ayangma* at para. 4; *Metro Can Construction Ltd. v. The Queen*, 2001 FCA 227 [*Metro Can*]. Rothstein J. (as he then was) in writing on behalf of the Court explained the rationale behind the Court's conclusion:

> If "a matter" included subsequent decisions, reconsideration could be sought in any previous case whenever there was a change in the law that would result in a different disposition of that previous case. Further, it would create unacceptable uncertainty for litigants and the public who must be satisfied that, once a judgment is rendered, it is final. We see no reason to depart from this analysis and conclusion.
>
> (*Metro Can* at para. 4)

[13] The moving parties take the position that, unlike new jurisprudence, the abovementioned provisions in the *Budget Implementation Act, 2024, No. 1* do not result in a change in the law. Rather, these provisions reinstate the law, that is, the regulations and the provisions of the Act

pertaining to regional assessments, on which this Court was asked to decide the appeal. Accordingly, the abovementioned provisions of the *Budget Implementation Act, 2024, No. 1* are a "matter" within the meaning of Rule 399(2)*(a)*.

[14] We do not accept that the abovementioned provisions in the *Budget Implementation Act, 2024, No. 1* merely reinstate the law on which this Court was asked to decide the appeal. On the contrary, two of the provisions on which the moving parties rely, section 318 and subsection 302(1), bring about a change in the law. These provisions deem the regulations to have been made on June 20, 2024 rather than on June 3, 2020—the date on which they were actually made.

[15] Within this frame of reference, the *Budget Implementation Act, 2024, No. 1* is akin to new jurisprudence. For that reason, we are not persuaded that the abovementioned provisions in the *Budget Implementation Act, 2024, No. 1* constitute a "matter" within the meaning of Rule 399(2)(*a*). Even if we were to accept that there exists a "matter", we find that the other two criteria to set aside the judgment are not met.

B. *The "matter" must not be discoverable prior to the decision*

[16] The moving parties argue that no exercise of due diligence could have allowed them to determine, prior to this Court's judgment, that the provisions of the *Budget Implementation Act, 2024, No. 1* would be adopted.

[17] We do not dispute that the moving parties did not know about the *Budget Implementation Act, 2024, No. 1* before its adoption. Nevertheless, we are of the view that this is not sufficient to meet the second condition for setting aside the judgment.

[18] This Court heard the appeal in Halifax on March 21, 2023. On that same day, the Supreme Court heard the reference on the validity of the Act. One appellant, World Wildlife Fund Canada, was a party to the reference before the Supreme Court. Thus, while the appellants may not have known what the Supreme Court's opinion was going to be, nor how the Government of Canada was going to react to the opinion, surely they knew that there was a possibility that the Act, or a portion thereof, would be declared unconstitutional with the ensuing possibility of legislative action. Yet they remained silent.

[19] Indeed, when this Court directed the parties to provide submissions concerning the impact of the Supreme Court's decision, the appellants referred to the government's stated intention to amend the Act. Nonetheless, the appellants never asked this Court to hold the appeal in abeyance pending the amendments. In this context, the second condition for setting aside the judgment is not met. As well, it would be a disregard of the principle of finality of judicial decisions to set aside a decision where the parties knew consequential legislative changes might happen after the decision but they chose to remain silent.

C. *The "matter" must have a determining influence on the decision*

[20] Paragraph 75 of this Court's reasons is as follows:

> Were the Minister to consider the Regional Assessment in making future regulations, perhaps a ruling from this Court that the [assessment] is reasonable and procedurally fair would be of no avail to the appellants. For instance, the passage of time or contextual changes might support arguments against the reasonableness or procedural fairness of the [assessment] that were not made in this appeal, thereby justifying another judicial challenge.

[21] The amendments brought by the *Budget Implementation Act, 2024, No. 1* do not contradict these words; in our opinion, they underscore their correctness. Before the Supreme Court's decision, the issue before our Court, as far as the regulations were concerned, was whether it was reasonable for the Minister to make these regulations in 2020 after having considered the assessment completed in that same year. By contrast, pursuant to the *Budget Implementation Act, 2024, No. 1*, the Minister is deemed to have made the regulations in 2024 after having considered "an assessment" that is in relation to the activities designated in the regulations. The *Budget Implementation Act, 2024, No. 1* raises new issues. For instance, was it reasonable to make the regulations in 2024? Was it reasonable to do so on the basis of a regional assessment completed in 2020? Does the phrase "an assessment" include, as the respondents argue, follow-up reports issued since 2020?

[22] It follows that the *Budget Implementation Act, 2024, No. 1* would not have a determinative influence on the judgment. Quite the reverse, the *Budget Implementation Act, 2024, No. 1* would raise new issues and require new evidence.

D. *Conclusion*

[23] For the foregoing reasons, the motion is dismissed with costs.

" Richard Boivin "
J.A.

" Sylvie E. Roussel "
J.A.

" Nathalie Goyette "
J.A.

APPENDIX

***Budget Implementation Act, 2024, No. 1*, S.C. 2024, c. 17**	***Loi n^o^ 1 d'exécution du budget de 2024*, L.C. 2024, ch. 17**
Transitional Provisions	**Dispositions transitoires**
Definitions	**Définitions**
302 (1) The following definitions apply in this section and sections 303 to 318.	**302 (1)** Les définitions qui suivent s'appliquent au présent article et aux articles 303 à 318.
amended Act means the *Impact Assessment Act*, as it reads on or after the commencement day. (*loi modifiée*)	*loi modifiée* La *Loi sur l'évaluation d'impact*, dans sa version à la date de référence ou après cette date. (*amended Act*)
	Loi de 2012 La Loi canadienne sur l'évaluation environnementale (2012), article 52 du chapitre 19 des Lois du Canada (2012). (2012 Act)
commencement day means the day on which this section comes into force. (*date de référence*)	*date de référence* La date d'entrée en vigueur du présent article. (*commencement day*)
…	[…]
Regional assessments — committee report provided	**Évaluations régionales — rapport du comité présenté**
309 (2) If a committee established by the Minister to conduct an assessment described in section 92 or 93 of the amended Act, or a committee the members of which are appointed or whose appointment is approved by the Minister for that purpose, has, before the commencement day, provided a report to the Minister in respect of the assessment, the report is deemed to be a report provided under subsection 102(1) of the amended Act.	**309 (2)** Si un comité — constitué par le ministre ou dont le ministre nomme les membres ou en approuve la nomination — chargé de procéder à une évaluation décrite aux articles 92 ou 93 de la loi modifiée a présenté au ministre son rapport d'évaluation avant la date de référence, le rapport est réputé présenté au titre du paragraphe 102(1) de la loi modifiée.
Regulations Respecting Excluded Physical Activities (Newfoundland	***Règlement visant des activités concrètes exclues (puits***

and Labrador Offshore Exploratory Wells)

318 (1) The *Regulations Respecting Excluded Physical Activities (Newfoundland and Labrador Offshore Exploratory Wells)*, as posted on the Internet site on June 4, 2020, are deemed

(a) to be made by the Minister, under paragraph 112(1)(a.2) of the amended Act, on the commencement day; and

(b) despite section 4 of the *Regulations Respecting Excluded Physical Activities (Newfoundland and Labrador Offshore Exploratory Wells)*, as so posted, to come into force on the commencement day.

(2) The Minister is deemed, for the purpose of subsection 112(2) of the amended Act, to have considered an assessment described in section 92 or 93 of the amended Act that is in relation to the physical activities or classes of physical activities designated in the *Regulations Respecting Excluded Physical Activities (Newfoundland and Labrador Offshore Exploratory Wells)*.

d'exploration au large des côtes de Terre-Neuve-et-Labrador)

318 (1) Le *Règlement visant des activités concrètes exclues (puits d'exploration au large des côtes de Terre-Neuve-et-Labrador)*, tel qu'il a été publié sur le site Internet le 4 juin 2020, est réputé, à la fois :

a) être pris par le ministre, à la date de référence, en vertu de l'alinéa 112(1)a.2) de la loi modifiée;

b) malgré l'article 4 du *Règlement visant des activités concrètes exclues (puits d'exploration au large des côtes de Terre-Neuve-et-Labrador)*, tel qu'il a été publié, entrer en vigueur à la date de référence.

(2) Pour l'application du paragraphe 112(2) de la loi modifiée, le ministre est réputé avoir pris en compte une évaluation décrite aux articles 92 ou 93 de la loi modifiée à l'égard des activités concrètes ou catégories d'activités concrètes désignées par le *Règlement visant des activités concrètes exclues (puits d'exploration au large des côtes de Terre-Neuve-et-Labrador)*.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-10-22
STYLE OF CAUSE:	SIERRA CLUB CANADA FOUNDATION AND WORLD WILDLIFE FUND CANADA and ECOLOGY ACTION CENTRE v. MINISTER OF ENVIRONMENT AND CLIMATE CHANGE AND THE ATTORNEY GENERAL OF CANADA and LE CONSEIL DES INNU DE EKUANITSHIT and, THE ATTORNEY GENERAL OF ONTARIO and THE ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY THE COURT:	BOIVIN J.A. ROUSSEL J.A. GOYETTE J.A.
DATED:	OCTOBER 10, 2024

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