Federal Court  Cour fédérale

Date: 20160906

Docket: T-454-16

Citation: 2016 FC 1007

[ENGLISH TRANSLATION]

Montréal, Quebec, September 6, 2016

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

CANADIAN SHIPOWNERS ASSOCIATION

Applicant

and

LAURENTIAN PILOTAGE AUTHORITY and CORPORATION DES PILOTES DU SAINT-LAURENT CENTRAL INC.

Respondents

JUDGMENT AND REASONS

[1] This is a motion by the applicant, the Canadian Shipowners Association ("the CSA"), appealing a decision rendered by Prothonotary Richard Morneau, on July 6, 2016, which granted the motion made by the Corporation des pilotes du Saint-Laurent Central Inc. ("the Corporation") to strike the CSA's application for judicial review in this case.

[2] For the following reasons, I find that the CSA's motion must be dismissed.

I. Standard of review

[3] Both parties have submitted that, since the prothonotary's discretionary decision addresses issues that are vital to the outcome of the case, I must exercise my own discretionary power in examining the case from the beginning (*Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 FCR 425 at p. 463 (CA) [*Aqua-Gem*]).

[4] However, on August 31, 2016, the Federal Court of Appeal issued its decision in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, overturning *Aqua-Gem* and concluding that the standard of review for a prothonotary's discretionary decision is that which is explained in the Supreme Court of Canada's decision in *Housen v. Nikolaisen*, 2002 SCC 33: findings of fact are not to be reversed unless it can be established that the prothonotary made a "palpable and overriding error"; for questions of law, as well as for questions of mixed fact and law in which a question of law can be found, the standard of review is that of correctness.

[5] *Hospira* significantly changes the standard of review for a prothonotary's discretionary decision, especially in the context of the facts of the motion at hand; *Aqua-Gem* calls for a *de novo* approach for questions of law and of fact, whereas *Hospira* requires deference regarding questions of fact.

[6] Although the parties have not had the opportunity to make arguments on *Hospira*, I have decided not to request additional submissions, since I am satisfied that my findings in this decision would remain unchanged, regardless of the applicable standard of review. Although my analysis below does not indicate any deference to the prothonotary's findings of fact, I affirm that I am in agreement with all of the prothonotary's findings of fact. My decision has the same result, regardless of whether I apply *Aqua-Gem* or *Hospira*.

II. Facts

[7] On March 18, 2016, the CSA tabled a notice of application for judicial review of an arbitral award made pursuant to section 15.1 of the *Pilotage Act*, RSC 1985, c. P-14 ("the Act"). The arbitral award concerned the contract renewal negotiations between the Corporation and the Laurentian Pilotage Authority ("the LPA") and dealt with certain clauses on which the Corporation and the LPA disagreed. According to section 15.2 of the Act, the arbitrator receives each party's final offer and then chooses one.

III. Analysis

[8] The CSA's concern with the arbitral award is in regard to the amount of advance notice given to pilots when the CSA requests their services. Specifically, the CSA submits that under certain circumstances, the amount of advance notice provided for by the arbitral award exceeds the amount of advance notice provided for in the *Laurentian Pilotage Authority Regulations*, CRC, c. 1268 ("the Regulations"), and therefore the service expectations held by CSA members based on the Regulations might not be met.

[9] The Corporation submits that the arbitral award is in regard to a contract between the LPA and the Corporation and that the CSA does not have the standing to file an application for judicial review of the arbitral award. The CSA does not agree and requests that it be allowed to pursue its application. Although the LPA has not made written submissions in this motion, its counsel indicated at the hearing that the LPA is in agreement with the CSA that it should be allowed to pursue its application.

[10] The CSA raised as a preliminary argument that the motion to strike is premature and that the question of standing should be decided at the hearing on the merits of the application.

[11] As Mr. Justice Harrington said in *Canadian Generic Pharmaceutical Association v. Canada (Governor in Council)*, 2007 FC 154 at paragraph 25:

> An application for judicial review is supposed to be decided in a summary way. The Court discourages interlocutory motions in applications for judicial review. Nevertheless, applications for judicial review have been dismissed at the outset if bereft of any chance of success.

[12] Questions of standing are treated a bit differently. The Federal Court of Appeal said the following in *Apotex Inc. v. Canada (Governor in Council)*, 2007 FCA 374 at paragraph 13:

> [13] It is not always appropriate for motions to strike to be the context to make a binding decision on a question of standing, especially when the motion is to strike out an application for judicial review. Rather, a judge should exercise her discretion as to whether it would be appropriate in the circumstances to render a decision on standing, or whether a final disposition of the question should be heard with the merits of the case. Evans J. (as he then was) briefly discussed the considerations a judge should take in exercising her discretion in *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211 (T.D.) ("Sierra Club") at paragraph 25 (emphasis added):

> In my view, a court should be prepared to terminate an application for judicial review on a preliminary motion to strike for lack of standing only in very clear cases. At this stage of the proceeding, the court may not have all the relevant facts before it, or the benefit of full legal argument on the statutory framework within which the administrative action in question was taken. To the extent that the strength of the applicant's case, and other factors, are relevant to the ground of discretionary standing, the Court may not be in a position to make a fully informed decision that would justify a denial of standing.
>
> I agree with Evans J. that this discretion should be exercised sparingly. This is affirmed by the principle that applications for judicial review are supposed to be decided summarily, and that interlocutory motions are to be avoided. This, indeed, as will be discussed below, explains why the test for the motion to strike on an application for judicial review is that the Application would be "bereft of success."
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> [Emphasis in the original.]

[13] Section 18.1 of the *Federal Courts Act*, RSC 1985, c. F-7 indicates that an application for judicial review can be made by anyone directly affected by the matter in respect of which relief is sought. A second way in which a party can have standing in an application for judicial review is when the circumstances are appropriate for public interest standing.

A. *Directly affected*

[14] A party is directly affected by the matter in respect of which relief is sought "when its legal rights are affected, legal obligations are imposed upon it, or it is prejudicially affected in some direct way": *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236 at paragraph 20.

[15] The CSA has two arguments in support of its position that it is directly affected by the matter in respect of which relief is sought. First, it notes that its members will suffer the effects of the arbitral award and the CSA must be entitled to represent its members. Second, the CSA submits that it is entitled to take part in any changes made to the Regulations and that the arbitral award has the effect of changing the Regulations without its participation and, therefore, is inappropriate.

[16] In support of its first argument, the CSA cites the case law to the effect that an association can have standing on behalf of its members. The major flaw in this argument is that it cannot help the CSA unless its members will be directly affected by the subject of this application. In my opinion, the impacts of the arbitral award will affect the CSA's members in an indirect way, rather than directly. It follows that the CSA is also affected only indirectly.

[17] Regarding the CSA's second argument in support of its position that it is directly affected by the subject of the application (the arbitral award has the effect of changing the Regulations), the parties focused on three decisions that are discussed below.

[18] In *Pilotes du Saint-Laurent Central Inc. v. Laurentian Pilotage Authority*, 2002 FCT 846, the conflict pertained to whether a second pilot would be required on a vessel in a particular situation. An arbitral award was made in favour of the Corporation. The Corporation sought to have the Federal Court's decision homologated. The prothonotary granted the homologation and the LPA appealed the prothonotary's decision, arguing that the arbitral award was inappropriate since it conflicted with the Regulations.

[19] The Corporation notes that the Act makes provision for the contract between it and the LPA and makes no provision for limits to the conditions that may be negotiated between the parties or for the participation of third parties in negotiations. However, another section of the Act addresses the Regulations as well as the active participation of third parties before its implementation. The Corporation submits that the Act carefully separates the creation of the Regulations from the negotiation of the contract between the LPA and the pilots. Referring to the Court's decision, the Corporation submits that the Regulations continue to apply regardless of the content of the contract between the Corporation and the LPA.

[20] For its part, the CSA attempts to set this decision apart by the fact that the Court found no conflict between the arbitral award and the Regulations.

[21] The second of the three decisions discussed by the parties on this topic, *Pilotes du St-Laurent Central Inc. v. Laurentian Pilotage Authority*, 2004 FC 1325, deals with a conflict over pilots' fees during the third year of the contract between the parties. As in the above-mentioned decision, (i) an arbitral award was made in favour of the Corporation, (ii) the Corporation tried to have it homologated before the Federal Court, (iii) the prothonotary granted the homologation, and (iv) the LPA appealed the prothonotary's decision. One of the LPA's arguments was that the arbitral award breached public order since the increase in pilots' fees was greater than what the LPA could absorb. Regarding this argument, the Court said the following at paragraph 18:

> I cannot see how this can be affected in the circumstances by the setting of a fee percentage. The LPA negotiated a contract which contains an arbitration clause giving the arbitrator jurisdiction to determine the amount of the PSLC fee increase scheduled for July 1, 2002. It has to be assumed that the LPA negotiated the terms of this contract in good faith. It is not justified in then arguing that it does not have the means to pay, that the effect of the

> arbitration award was to force the hands of public agencies and that there was accordingly a breach of public order. First, the arbitrator concluded that the LPA was able to pay, and as I have already said, it is not for this Court to review the validity of that conclusion by examining the merits of the dispute. Then, it is important to avoid widespread recourse to public order in the field of the arbitration system, so as to preserve the decision-making independence of arbitration. The fact that the outcome of the dispute may have an impact on third parties, in any case, is not a factor that can be a basis for denying homologation.

[22] Here, the Court made reference to the Supreme Court of Canada's decision in *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] 1 SCR 178. At paragraph 62 of that decision, the Court declared:

> The arbitration proceeding in this case was between two private parties involved in a dispute as to the proper interpretation of a contract. The arbitrator ruled as to the ownership of the copyright in order to decide as to the rights and obligations of the parties to the contract. The arbitral decision is authority between the parties, but is not binding on third parties who were not involved in the proceeding.

[23] The CSA attempts to set apart these two decisions on the same basis as the first decision discussed above: the Court found that there was no conflict between the contract (the arbitral award) and the legal provisions. The CSA submits that this is not the case with the application at hand.

[24] In my opinion, the Supreme Court's statement that a contract between private parties does not bind third parties who were not involved in the proceeding applies to the application at hand. The Court's reasoning does not seem to depend on an absence of conflict between the contract (the arbitral award) and the legal provisions.

[25] The third decision discussed by the parties, *Corporation des pilotes du bas Saint-Laurent v. Administration de pilotage des Laurentides*, [1999] Q.J. No. 5368 (QL), 1999 CanLII 10920 (QC CS), comes from a different court and involves a different pilots' corporation. The conflict this time involves the end date of the [TRANSLATION] "winter navigation" period and the pilots' argument that the LPA had failed to fulfil its duty to consult them in this regard. The arbitrator ruled in favour of the pilots and the pilots went before the Court (here, the Superior Court of the Province of Quebec) to request that the arbitral decision be homologated. Among its arguments against homologation, the LPA submitted that the arbitral award breached public order by imposing a standard that contravened the Act and its Regulations. In granting the homologation motion, the Court stated the following at paragraph 29:

> [TRANSLATION] The arbitral decision does not further change the Regulations on pilotage. It simply finds that the Authority failed to comply with them in one particular instance. If third parties suffer consequences as a result of the award, they cannot be due to the award itself, but to the impact of laws, regulations or agreements involving these third parties and the Authority. If third parties—shipowners, for example—are aggrieved by the impact of the decision, it is not the decision that they must challenge, but rather the originator of the illegal act.

[26] Again, the CSA sets apart this decision on the basis that the Court found that there was no conflict between the arbitral award and the Act.

[27] In my opinion, the above-mentioned decisions clearly indicate that an arbitral award, regardless of its content, cannot change a regulation. For this reason, I am of the opinion that the CSA's argument to the effect that the arbitral award at hand changed the Regulations such that the CSA had the right to participate, has no chance of being accepted. Furthermore, any harm that the CSA or its members might suffer in this regard would constitute indirect harm, not direct

harm. It follows that the CSA's second argument in support of its position, according to which it is directly affected by the matter in respect of which relief is sought, cannot succeed.

[28] Therefore, I find that the CSA is not directly affected by the matter in respect of which relief is sought.

B. *Public interest*

[29] The parties agree, and I concur, that the most notable authority on public interest standing is the Supreme Court of Canada's decision in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45. The Supreme Court indicates that the courts have taken a flexible, discretionary approach to public interest standing: see paragraph 1. The Court identifies three factors that courts must take into consideration when exercising the discretionary power to allow public interest standing or not:

1) Does the case raise a serious justiciable issue?
2) Does the party bringing the action have a real stake or a genuine interest in the outcome of this issue?
3) Having regard to a number of factors, is the proposed suit a reasonable and effective means to bring the case to court? (See paragraphs 2 and 37.)

[30] The Court also indicates that these factors must be applied with a flexible, discretionary and purposive approach: see paragraph 44.

[31] I weigh each of these factors in the following paragraphs.

(1) Serious justiciable issue

[32] To constitute a serious issue, the question raised must be a substantial constitutional issue or an important question. The claim must be far from frivolous: see paragraph 42. This factor also reflects the need to screen out the mere busybody: see paragraph 41.

[33] The CSA submits that it is not acting as a mere busybody and that the question of whether an arbitral award might be in conflict with a regulation is important and far from being frivolous. The Corporation argues that the question is specific to this case and that it is not important.

[34] In my opinion, the threshold of importance for determining what is a serious issue is not very high. I am of the opinion that a serious justiciable issue is raised in this application.

(2) Real stake or genuine interest

[35] Here as well, I am of the opinion that the threshold is not very high. I am satisfied that the CSA has a genuine interest in this application, since wait times for pilot services for its members may be affected by the arbitral award.

(3) Reasonable and effective means

[36] The Court indicates that this factor must not be applied rigidly. Rather, it indicates that the applicable principles should be interpreted "in a liberal and generous manner": see paragraph 48. It is not necessary for the CSA to establish that there is no other reasonable and effective means to bring the issue before the Court.

[37] The Court also indicates that this factor must be applied purposively in order to ensure full and complete adversarial presentation and to conserve judicial resources: see paragraph 49.

[38] In addition, the Court indicates that a flexible approach is required in assessing this factor. There is no binary, yes or no, analysis possible: whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances: see paragraph 50.

[39] The Court notes that it should be considered whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action: see paragraph 51.

[40] The Court also suggests that it should be determined whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination. The Court explains at paragraph 51:

> The existence of other potential plaintiffs, particularly those who would have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities. Where there are other actual plaintiffs in the sense that other proceedings in relation to the matter are under way, the court should assess from a practical perspective what, if anything, is to be gained by having parallel proceedings and whether the other proceedings will resolve the issues in an equally or more reasonable and effective manner. In doing so, the court should consider not only the particular legal issues or issues raised, but whether the plaintiff brings any particularly useful or distinctive perspective to the resolution of those issues.

[41] Lastly, the Court indicates that the potential impact of the proceedings on the rights of others who are equally or more directly affected should be taken into account.

[42] The Corporation submits that the CSA should not have public interest standing since the LPA already brought an application for judicial review of the arbitral award. The Corporation notes that the LPA raises the same arguments as the CSA.

[43] In response, the CSA submits that its interests are not the same as those of the LPA. The Act provides that the CSA has the right to pilots' services, while the LPA has the duty to provide these services. The CSA also fears that a settlement might be reached regarding the LPA's application.

[44] As indicated above, the LPA agrees that the CSA has standing in this application.

[45] In my opinion, public interest does not require the CSA to have standing in the application at hand. I arrive at this conclusion because the same issues have already been raised before this Court in the application made by the LPA, which is a party to the contract with the

Corporation and therefore directly affected by the matter in respect of which relief is sought. The LPA's dispute is a true adversarial contest.

[46] Although the LPA's and CSA's interests are not exactly the same, I am not convinced that the arguments of the latter would be significantly different from those of the former. The CSA did not identify any argument it would make that the LPA would not make. In my opinion, the Court's decision in *Sunshine Village Corp v. Canada (Directeur du Parc national Banff)* (1994), [1995] 1 FC 420 (T.D.), affirmed in [1996] FCJ No. 1118 (QL) (CA), is different in that there is no indication that the LPA ever changed its position.

[47] Although the question in the application at hand is important enough to satisfy the first of the criteria for public interest standing, I am not convinced that it is important enough to transcend the interests of those most directly affected by the challenged law or action. I do not view involving the CSA in the LPA's application (assuming that the application at hand is merged with that of the LPA) as a more efficient and effective use of judicial resources than leaving the LPA application by itself.

[48] Now I must consider the CSA's argument that, even if I am of the opinion that it does not have standing, I must not strike its application so that the Corporation can establish that it has no chance of being allowed. I am satisfied that the CSA cannot possibly establish that it is directly affected by the matter in respect of which relief is sought. As for public interest standing, it is hard to establish that there is no chance of success, since the test is so subjective. Nevertheless, I do not see how the CSA can overcome the fact that it would not contribute anything to the case that the LPA could not contribute. Even the evidence of CSA witnesses could have been

submitted in the context of the LPA application. Since effectiveness is a consideration that must be applied with flexibility and since there would be a significant loss of effectiveness if the CSA were allowed to pursue its application for judicial review until the hearing on the merits, I am of the opinion that the CSA's application is not a reasonable and effective means of bringing the matter before the Court. In my opinion, the CSA does not have public interest standing.

IV. Conclusion

[49] For these reasons, I agree with Prothonotary Morneau that the CSA does not have standing in this application and that the present motion appealing Prothonotary Morneau's decision must be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the present motion appealing Prothonotary Morneau's decision rendered on July 6, 2016, must be dismissed with costs.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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