Federal Court  Cour fédérale

Date: 20170531

Docket: T-1190-16

Citation: 2017 FC 535

[ENGLISH TRANSLATION]

Ottawa, Ontario, Wednesday, May 31, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

HABITATIONS ÎLOT ST-JACQUES INC.

Applicant

and

THE ATTORNEY GENERAL OF CANADA AND THE MINISTER OF ENVIRONMENT

Respondents

JUDGMENT AND REASONS

[1] Habitations Îlot St-Jacques Inc. is appealing an order issued by Prothonotary Richard Morneau on March 27, 2017.

[2] The applicant wants to amend its July 14, 2016, application for judicial review. The March 27 order denies this amendment. The applicant wants to reverse this decision using the appeal allowed under rule 51 of the *Federal Courts Rules,* SOR/98-106 [the Rules].

I. Facts

[3] At the heart of this affair is the *Emergency Order for the Protection of the Western Chorus Frog (Great Lakes / St. Lawrence —Canadian Shield Population)* [the Order], SOR/2016-211, adopted on June 17, 2016, on recommendation of the Minister of Environment and Climate Change Canada. This emergency order was adopted under the *Species at Risk Act* (SC 2002, c. 29).

[4] It affects a piece of land that the applicant acquired in 2010 and that it wants to use for a residential development. According to the application for judicial review, nearly 91% of the applicant's lot is affected by the Order, which severely restricts the enjoyment of the affected land.

[5] The relief sought in the application for judicial review is that the emergency order be cancelled and found unenforceable against the applicant. According to the applicant, this Court should refer the file back to the Minister of Environment and Climate Change to consult those who would be affected by such an order. In fact, the main argument presented in the application for judicial review is that the applicant was not consulted before the Privy Council passed the order. Alternately, the applicant is asking that the Order be found invalid only as it applies to its lot.

[6] In a March 1, 2017, written application, Habitations Îlot St-Jacques Inc. asked this Court to amend its application for judicial review, which sought only to cancel the emergency order. Based mainly on rule 75, the applicant argued that the requested amendment was in fact adding what they referred to as a *mandamus* alternative conclusion without changing the facts on record. However, whereas the original application for judicial review aimed to cancel the emergency order, the amendment would aim to force a regulation to be made to allow for compensation.

[7] Although it stated that the facts of the case did not need to be changed, the amendment would have required additional evidence to be allowed. The applicant wanted to demonstrate that the value of its property decreased because of the emergency order. The addition of these claims could be seen as a basis for the applicant to request compensation under section 64 of the *Species at Risk Act*. This section reads as follows:

Compensation	**Indemnisation**
64 (1) The Minister may, in accordance with the regulations, provide fair and reasonable compensation to any person for losses suffered as a result of any extraordinary impact of the application of	**64 (1)** Le ministre peut, en conformité avec les règlements, verser à toute personne une indemnité juste et raisonnable pour les pertes subies en raison des conséquences extraordinaires que pourrait avoir l'application :
(a) section 58, 60 or 61; or	**a)** des articles 58, 60 ou 61;
(b) an emergency order in respect of habitat identified in the emergency order that is necessary for the survival or recovery of a wildlife species.	**b)** d'un décret d'urgence en ce qui concerne l'habitat qui y est désigné comme nécessaire à la survie ou au rétablissement d'une espèce sauvage.
Regulations	**Règlements**
(2) The Governor in Council	**(2)** Le gouverneur en conseil

shall make regulations that the Governor in Council considers necessary for carrying out the purposes and provisions of subsection (1), including regulations prescribing	doit, par règlement, prendre toute mesure qu'il juge nécessaire à l'application du paragraphe (1), notamment fixer :
(a) the procedures to be followed in claiming compensation;	**a)** la marche à suivre pour réclamer une indemnité;
(b) the methods to be used in determining the eligibility of a person for compensation, the amount of loss suffered by a person and the amount of compensation in respect of any loss; and	**b)** le mode de détermination du droit à indemnité, de la valeur de la perte subie et du montant de l'indemnité pour cette perte;
(c) the terms and conditions for the provision of compensation.	**c)** les modalités de l'indemnisation.

[8] The amended application for judicial review as proposed by the applicant would seek the following finding in addition to those already presented:

> [Translation] Alternately, order the Governor in Council, in accordance with subsection 64(2), to take any initiatives by regulation that he deems necessary to enforce subsection 64(1) of the *Species at Risk Act*, SC 2002, c. 29, including prescribing (a) the procedures to be followed in claiming compensation; (b) the methods to be used in determining the eligibility of a person for compensation, the amount of loss suffered by a person and the amount of compensation in respect of any loss; and (c) the terms and conditions for the provision of compensation.

The amended application added three paragraphs and three exhibits to attempt to argue for the difference in market value of the affected land.

II. Decision and appeal

[9] This application, presented as an application to amend, was denied by Prothonotary Morneau on March 27, 2017 (2017 FC 319).

[10] The prothonotary found that there were two different judicial review proceedings, which would violate rules 302 of the *Federal Courts Rules*. This rule reads as follows:

302 Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.	**302** Sauf ordonnance contraire de la Cour, la demande de contrôle judiciaire ne peut porter que sur une seule ordonnance pour laquelle une réparation est demandée.

[11] In paragraph 5, Prothonotary Morneau noted that the applicant had already stated before Prothonotary Tabib [TRANSLATION] "unequivocally that the one and only decision targeted by the application for judicial review was that of the Governor in Council, the *Emergency Order for the Protection of the Western Chorus Frog (Great Lakes / St. Lawrence — Canadian Shield Population)*". In other words, the issue in the original application for judicial review is a *certiorari*, one of the extraordinary remedies designated in section 18 of the *Federal Courts Act*, RSC (1985), c. F-7. The proposed amendment is different. It is a *mandamus*. Yet it is clear, simply from reading section 18, that *certiorari* and *mandamus* are two different remedies that fall under the concept of judicial review. They allow a superior court to intervene, but the conditions of their application are very different, as are those of prohibition and *quo warranto*.

[12] Prothonotary Morneau stated as much in paragraph 9 of his order:

> [Translation]
> [9] The central, determining aspect of the application appears to be addition of a *mandamus* alternative conclusion to the application for judicial review. However, such an addition in this case would not help with determining the real question in controversy in the application.

[13] Far from serving the purpose of determining the real question in controversy between the parties (*Canderel Ltd. v. Canada*, [1994] 1 FCR 3 (CA)), the applicant's application would open another question. This application was denied because it is not an amendment and would allow two remedies in the same application for judicial review.

[14] The addition of various documents to the file is also denied, since this addition supports the *mandamus* application that the applicant would now like to file.

III. Analysis

[15] As I see it, the most natural way to resolve this case is to stick to a rigorous review of the remedies sought. This review inevitably leads to the finding that the applicant is seeking an entirely new remedy through the "amendment" it is presenting. It is less of an amendment and more of a different application for judicial review.

[16] We can then consider whether it is appropriate, on appeal, to allow the argument based on the applicable standard for appeals of a prothonotary's decision.

[17] The applicant is seeking what it presents as two amendments: a *mandamus* finding to force the implementation of a compensation process and the allowance of new evidence on the

decreased value of the lot affected by the Order. Remember that the proposed amendments fall under a *certiorari* proceeding, in which the applicant wants to strike down the Order due to the alleged flaws in procedural fairness.

[18] Before taking a closer look at the remedies, some comments should be made on the way the prothonotary's decision was appealed. The applicant's memorandum of fact and law does not discuss the standard to be applied in the appeal. But this is essential information. The applicant must set the standard to achieve for it to be successful in its appeal. And the only question asked before Prothonotary Morneau was whether the amendment should be allowed. As we will see below, I am of the opinion that there was no cause to intervene, since it was not demonstrated that there was an error in refusing the additional evidence, which is merely accessory to the main evidence, i.e. the evidence supporting the *mandamus* application, and is not relevant to this application. Moreover, *mandamus* is a separate remedy that the prothonotary could decide not to add to a remedy already in progress.

[19] Yet the appeal was conducted in large part as if there could be a *de novo* hearing, in which this Court could replace the first decision-maker's discretion and evaluation of the facts with its own. As evidence of this, I point to paragraphs 19 and 20 of the applicant's memorandum of fact and law. It cites *Bristol-Myers Squibb Company v. Apotex Inc.*, 2008 FC 1196. This case in turn cited the well-known *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 FCR 425 (CA) [*Aqua-Gem*], which determined the applicable standard for appeals. This is no longer the case, since the Federal Court of Appeal overturned *Aqua-Gem* in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*]. Since then, the only standard for the appeal of discretionary decisions made by prothonotaries is that of any civil

appeal. This standard was put in place by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235. It is described succinctly as follows in paragraph 66 of *Hospira*:

> [66] In *Housen*, the Supreme Court enunciated the standard of review applicable to decisions of trial judges. More particularly, it concluded that with respect to factual conclusions reached by a trial judge, the applicable standard was that of palpable and overriding error. It also stated that with respect to questions of law and questions of mixed fact and law, where there was an extricable legal principle at issue, the applicable standard was that of correctness (paragraphs 19 to 37 of *Housen*).
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> [Emphasis ours.]

[20] Thus, it is not this Court's duty to accept the applicant's invitation claiming that [TRANSLATION] "this amendment is 'vital' to its case in that it allows it to add a remedy that can resolve the situation as a whole and asks that this appeal be heard *de novo*" (paragraph 20, memorandum of fact and law). Rather, it is the applicant's responsibility to cite and demonstrate an extricable error of law leading to the standard of correctness, or failing that, a palpable and overriding error in Prothonotary Morneau's decision. Neither of the proposed amendments demonstrated this.

[21] The decision under appeal is based on two statements that have never been invalidated. First, the two remedies, in the form of two judicial reviews, one a *certiorari* proceeding to set aside a decision to issue an emergency order, and the other a *mandamus* proceeding to force a regulation to be made to allow for compensation, are completely different.

[22] Metaphorically, the *certiorari* judicial review could be seen as more "defensive," in that it aims to set aside an administrative decision, whereas the *mandamus*, which aims to force an action, is more "offensive." Each type of remedy has its own rules (see Brown & Evans, *Judicial Review of Administrative Action in Canada*, #1.3000 and following and # 1200 and following).

[23] In this case, it seems indisputable that the addition of a *mandamus* would allow [TRANSLATION] "in a single application for judicial review, the dispute of two different decision-making processes with different and independent factual and legislative dynamics" (decision under appeal, paragraph 10). The original remedy sought only to overturn the Order. This Order was issued under section 80 of the *Species at Risk Act*. This is the litigation against which the applicant is attempting, through an amendment under rule 75, to register a new remedy. On the other hand, the proposed *mandamus* aims to force an action under section 64 of the same Act. It is clear why Prothonotary Morneau refers to two different decision-making processes. The acts cited are different, and the remedies have different rules for eligibility and lead to unrelated remedies.

[24] The Prothonotary's second submission is that the traditional test to allow an amendment, which in fact is not disputed in this case, is taken from *Canderel Ltd. v. Canada*, [1994] 1 FCR 3 (CA). At any stage of proceedings, it can be modified "for the purpose of determining the real question in controversy" (p. 10). As authors Letarte, Veilleux et al note in *Recours et procédure devant les Cours fédérales* (LexisNexis, 2013), [translation] "many decisions allow modifications when they are requested during preparation for a hearing with the goal of clarifying facts already in dispute, but without adding new causes of action" (#3–38). I note that the authors specify that the amendment must not add any new cause of action and that it must

clarify the facts. The Prothonotary found that the applicant had a different goal. To an application for judicial review to overturn an order, the amendment added a new remedy with the ultimate purpose of obtaining compensation. The proposed amendment did not clarify the facts at issue in overturning an order; instead, it opened a new issue.

[25] There is a reason for rule 302. It was upheld by the Federal Court of Appeal in *Zaghbib v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 182. In this case, the Court even refused to transform one remedy into another, never mind upholding two such remedies in the same application:

> [50] Can we return the matter to the Federal Court for consideration of whether the respondent's decision was reasonable? The effect of this would be to convert what began as an application for judicial review seeking *mandamus* to an application for judicial review seeking to set aside a specific decision. Since both are applications for judicial review, one could argue that this is a single ongoing application for judicial review, in which the relief sought changed in the course of the application. The reality is a little more complex in that not only is different relief sought but a different decision or matter is being reviewed.
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> [51] A change in the subject matter of the judicial review is essentially a new judicial review. The language of subsection 72(1) requires leave for the commencement of an application for judicial review of any matter ("a decision, determination or order made, a measure taken or a question raised" – note the use of the singular). In the same vein, Rule 302 of the *Federal Courts Rules* SOR/98-106 stipulates that an application for judicial review shall be limited to a single order in respect of which relief is sought. To that extent, my earlier reference to "a single ongoing application for judicial review" is inapt.
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> [52] What little authority there is on this question in the Federal Court is against the proposition that an application for *mandamus* can be converted into an application for judicial review of the resulting decision: see *Figueroa v. Canada (Minister of Foreign Affairs Trade Development)*, 2015 FC 1341 (CanLII), [2015] F.C.J. No. 1415 [*Figueroa*]; *Farhadi v. Canada (Minister of*

Citizenship and Immigration), 2014 FC 926 (CanLII), [2014] F.C.J. No. 959 [*Faradic*].

[Emphasis added.]

[26] Essentially, the applicant is proposing a confusion of types because it wants to expand its litigation. In my opinion, the decision in *Truehope Nutritional Support Ltd. v. Canada (Attorney General)*, 2004 FC 658 is completely useless to it. In fact, it is harmful to it. In this case, this Court allowed a single application for two decisions. Justice Campbell allowed the order under rule 302, but did so because "the acts in question must not involve two different factual situations, two different types of relief sought, and two different decision-making bodies" (paragraph 6). The conditions presented by Justice Campbell are not present because, in our case, the facts are different and so are the remedies. The applicant now wants to allege that the value of its property decreased because of the Order in an attempt to justify a *mandamus*, and the remedies are completely different. In one case, the applicant wants this Court to overturn an order, while in the other, it wants to force a regulation to be made to allow for compensation.

[27] The applicant had the burden of demonstrating an error of law or a palpable and overriding error. The issue is not for this Court to determine how it would exercise its discretion *de novo*, but to determine whether the applicant has demonstrated that an error was made, with an error in law being subject to the standard of correctness and other types of error to the standard of palpable and overriding error. Unfortunately for the applicant, it failed. It did not demonstrate either an extricable error of law or a palpable and overriding error.

[28] The same applies to the application to amend the facts of the motion. These new facts about the value of the property are secondary to the main case. They would be relevant only if a *mandamus* application was presented, since they would serve to demonstrate damages caused in a compensation case. The respondents argued that the loss of value is completely irrelevant to an application for judicial review to overturn an order to protect a species at risk. The prothonotary allowed this argument. The applicant failed to prove any error requiring the intervention of this Court.

IV. New submissions

[29] At the appeal hearing, the applicant argued for the first time that section 44 of the *Federal Courts Act* applied to the case. This section reads as follows:

***Mandamus*, injunction, specific performance or appointment of receiver**	***Mandamus*, injonction, exécution intégrale ou nomination d'un séquestre**
44 In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a mandamus, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just.	**44** Indépendamment de toute autre forme de réparation qu'elle peut accorder, la Cour d'appel fédérale ou la Cour fédérale peut, dans tous les cas où il lui paraît juste ou opportun de le faire, décerner un mandamus, une injonction ou une ordonnance d'exécution intégrale, ou nommer un séquestre, soit sans condition, soit selon les modalités qu'elle juge équitables.

[30] There are multiple problems with the applicant's approach. First, this argument took the defendants by surprise, since no notice was given in either the notice of appeal or the memorandum of fact and law. This in itself causes another problem, since this Court is hearing only the appeal of a decision by a prothonotary who ruled only on what he had before him. And section 44 was never brought up before Prothonotary Morneau. There is reason to question the appropriateness of an appeal of a prothonotary's decision examining an argument that was never even raised before this prothonotary. Without a more exhaustive debate in which the arguments are presented more fully, there is a risk of not addressing the issue appropriately.

[31] Accordingly, it is useful to define the scope of section 44 and to determine whether it can be raised in the appeal of a prothonotary's decision when he cannot have ruled on the question, since it was not even asked before him. Rather than refusing to consider it without further argument, because it comes after the fact, this Court decided to ask the parties to present their arguments in writing.

V. Section 44 of the *Federal Courts Act*

[32] The parties provided this Court with additional memorandums on the applicant's argument citing section 44 of the *Federal Courts Act in extremis*.

[33] The purpose of these additional memorandums was to explain the use proposed by the applicant, since it cited this section for the first time in the appeal hearing. Astonishingly, the applicant never explained in its additional memorandum how this Court could, in the appeal, use an argument that was never made before the prothonotary. The only thing approaching an

explanation, though it was not one, was that the prothonotary did not have this question before him because he could not order the remedy. But that is not the issue. Independently of section 44, the applicant claimed it was arguing in favour of a *mandamus* within a *certiorari* application for judicial review. It was merely an application for an amendment that the prothonotary had the jurisdiction to allow, even though judicial review, whether *mandamus* or *certiorari*, is the domain of the Federal Court. The fact that section 44 was now cited changed nothing: it was still a *mandamus*. The prothonotary could have considered the argument. But contrary to all expectations, the additional memorandum became an independent *mandamus* application.

[34] To explain how section 44 improved the applicant's position in its amendment to add a *mandamus* to a *certiorari*, the additional memorandum became a *sui generis* application that this Court, with no other procedural support, evidence, or argument, grant a *mandamus* under section 44.

[35] Such a statement is the result of a lack of comprehension of the procedure. The applicant then made the even more surprising proposal that this Court, in an appeal of a prothonotary's decision, could immediately issue a *mandamus* order on the making of regulations, while this Court hears an entirely different remedy aiming to overturn an order. This enthusiastic suggestion by the applicant is poorly explained. It seems to stem from its reading of section 44 *in fine*.

[36] The applicant seems to believe that the words [TRANSLATION] "with or without conditions" create a kind of extraordinary jurisdiction for the Federal Court. Using the word "condition" as authorization, the applicant claims it would be [TRANSLATION] "related to the

conditions in place at the time the *mandamus* is implemented." The applicant is referring to the conditions of issue listed in *Apotex Inc. v Canada (Attorney General)*, [1992] 1 CF 742 (CA) and seems to be reading the words "without conditions" in section 44 as meaning a *mandamus* can be issued without the conditions of issue. If I understand the claim, this would allow the conditions of issue of a *mandamus* to be overlooked. It would suffice for it to seem just or convenient to the Court.

[37] That said, with due consideration, this claim based essentially on the word "condition" is void. It would be a misinterpretation of section 44 to see this word as replacing the conditions required to issue a *mandamus*. I am reproducing section 44 once again for comprehension purposes:

***Mandamus*, injunction, specific performance or appointment of receiver**	***Mandamus*, injonction, exécution intégrale ou nomination d'un séquestre**
44 In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a *mandamus*, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just.	**44** Indépendamment de toute autre forme de réparation qu'elle peut accorder, la Cour d'appel fédérale ou la Cour fédérale peut, dans tous les cas où il lui paraît juste ou opportun de le faire, décerner un *mandamus*, une injonction ou une ordonnance d'exécution intégrale, ou nommer un séquestre, soit sans condition, soit selon les modalités qu'elle juge équitables.

[38] As we can see, contrary to the applicant's claim, the law does not state that the *mandamus* can be issued without the required conditions. Rather the text states that the four

remedies under section 44 (*mandamus*, injunction, order for specific performance, appointment of a receiver) create orders that are unconditional or on just terms and conditions. In fact, the English version is especially explicit. Evidently, these are not required conditions to issue the order, but conditions to include in the order for its execution. Thus section 44 does not state that the *mandamus* can be allowed without the issuing conditions; it states rather that the order issued may or may not include conditions.

[39] In my opinion, the applicant misunderstands the scope of section 44. This provision is not unique to the *Federal Courts Act*. It is a jurisdiction-granting section, nothing more. It does not state how the remedy should be presented in Court; nor does it state that the conditions for remedies have changed. It merely states that the Court has this jurisdiction. Justice Muldoon wrote in *Canada (Human Rights Commission) v. Canadian Liberty Net (T.D.)*, [1992] 3 FCR 155:

> There must be a statutory grant of jurisdiction by Parliament. It seems clear that ss. 25 and 44 of the *Federal Court Act*, above-recited, satisfy this first requirement in according jurisdiction to this court. Those two sections are nothing, if not statutory grants of jurisdiction. In particular, when read together, they accord jurisdiction to grant or award an injunction in any case in which that relief is sought, between "subject and subject", under or by virtue of the laws of Canada, where it appears to be just or convenient to do so, if no other court constituted, established or continued under any of the *Constitution Acts 1867 to 1982* has jurisdiction in respect of that claim or remedy.
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> (page 167)

[40] In an appeal of this decision (*Canada (Human Rights Commission) v. Canadian Liberty Net*, [1996] 1 FCR 804 [*Canadian Liberty Net*]), Justice Strayer found the origin of section 44 to be the *Supreme Court of Judicature Act, 1873* (UK), 36 & 37 Vict. ch 66. The wording of subsection 25(8) of this United Kingdom act, which results from the specificities of British law and its development, has much in common with our section 44. The main issue was then to determine whether the issuing of the injunction was limited to actions real or apprehended or potential in the Court. If another body has jurisdiction over the remedy, for example the Human Rights Tribunal, which will provide a remedy if appropriate, then can the injunction (or *mandamus*) be ordered until another body makes a finding? The injunction issued by Justice Muldoon was overturned in the appeal. The case went to the Supreme Court of Canada.

[41] In *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 SCR 626, Mr. Justice Bastarache raised the "issue of the existence and proper exercise of an injunctive power in the Federal Court of Canada in support of federal legislation" (paragraph 1). In this case, the Canadian Human Rights Commission applied for an injunction to prohibit the communication of telephone messages the Commission considered hateful, until the Human Rights Tribunal ruled on the complaints. Could the Federal Court issue such a remedy? Was there a federal law granting jurisdiction?

[42] Previously, in *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, [1996] 2 SCR 495 [*Brotherhood*], the Supreme Court of Canada ruled that a provincial superior court could issue an injunction restraining the employer from changing the *status quo* until a grievance was settled on changes to the work schedule made by the employer. The provision cited to allow jurisdiction was section 36 of the British Columbia

Law and Equity Act, RSBC 1979, c. 224 [*Law and Equity Act*], which once again bears a strong resemblance to section 44 of the *Federal Courts Act*. It read as follows:

36. A mandamus or an injunction may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made, and the order may be made either unconditionally or on terms and conditions the court thinks just. . . .	[TRADUCTION] **36.** Un bref de mandamus ou une injonction peut être accordé, ou un séquestre ou administrateur séquestre nommé, par ordonnance interlocutoire de la cour dans tous les cas où la cour juge juste et pratique de décerner une telle ordonnance, inconditionnellement ou aux conditions qu'elle estime justes . . .

[43] The Court therefore ruled on two issues. One, the Supreme Court of British Columbia has jurisdiction to issue an injunction even though the *Canada Labour Code*, RSC (1985), c. L-2, does not provide any such remedy, under section 36 of the *Law Equity Act*. Two, the Court found that this authority is not limited to cases where the injunction is ancillary to a cause of action before a superior court, based on the development of case law in the United Kingdom (paragraph 15). The conclusion was:

> 16 Canadian courts since *Channel Tunnel* have applied it for the proposition that the courts have jurisdiction to grant an injunction where there is a justiciable right, wherever that right may fall to be determined: *Amherst (Town) v. Canadian Broadcasting Corp.* (1994), 1994 CanLII 4012 (NS CA), 133 N.S.R. (2d) 277 (C.A.), at pp. 279 and 281; *R. v. Consolidated Fastfrate Transport Inc.* (1995), 1995 CanLII 1527 (ON CA), 125 D.L.R. (4th) 1 (Ont. C.A.), at pp. 26-27. See also *Kaiser Resources Ltd. v. Western Canada Beverage Corp.* (1992), 71 B.C.L.R. (2d) 236 (S.C.), at pp. 244-45. This accords with the more general recognition throughout Canada that the court may grant interim relief where final relief will be granted in another forum: *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1992 CanLII 8674 (FC), [1992] 3 F.C. 155 (T.D.) (rev'd 1996 CanLII 4022 (FCA), [1996] 1 F.C. 804 (C.A.), leave to appeal to S.C.C. filed March 25, 1996*); *St. Anne Nackawic, supra; Weber, supra*;

> *Moore v. British Columbia* (1988), 1988 CanLII 184 (BC CA), 50 D.L.R. (4th) 29 (B.C.C.A.); *Retail Store Employees' Union, Local 832 v. Canada Safeway Ltd.* (1980), 1979 CanLII 2610 (MB QB), 2 Man. R. (2d) 100 (C.A.); *O'Leary, supra; Kelso, supra*.
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> [Emphasis added.]

[44] Two years later, the Supreme Court widened the scope of *Brotherhood* to the Federal Court by applying section 44. Not only did there not have to be a cause of action to support the remedies under section 44, but also the Federal Court had the authority to award an injunction prohibiting certain behaviour under the *Human Rights Act*. It reads:

> 36 As is clear from the face of the *Federal Court Act*, and confirmed by the additional role conferred on it in other federal Acts, in this case the *Human Rights Act*, Parliament intended to grant a general administrative jurisdiction over federal tribunals to the Federal Court. Within the sphere of control and exercise of powers over administrative decision-makers, the powers conferred on the Federal Court by statute should not be interpreted in a narrow fashion. This means that where an issue is clearly related to the control and exercise of powers of an administrative agency, which includes the interim measures to regulate disputes whose final disposition is left to an administrative decision-maker, the Federal Court can be considered to have a plenary jurisdiction.
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> 37 In this case, I believe it is within the obvious intendment of the *Federal Court Act* and the *Human Rights Act* that s. 44 grant jurisdiction to issue an injunction in support of the latter. I reach this conclusion on the basis that the Federal Court does have the power to grant "other relief" in matters before the Human Rights Tribunal, and that fact is not altered merely because Parliament has conferred determination of the merits to an expert administrative decision-maker. As I have noted above, the decisions and operation of the Tribunal are subject to the close scrutiny and control of the Federal Court, including the transformation of the order of the Tribunal into an order of the Federal Court. These powers amount to "other relief" for the purposes of s. 44.

[45] It is clear that section 44 awards jurisdiction. However, it does not change the conditions for issuing a remedy authorized by the section, nor does it in any way deal with the procedural support required to bring a remedy application before the Court.

[46] Disregarding all procedural rules, the applicant is inviting this Court, on appeal of a prothonotary's decision, to [TRANSLATION] "issue a *mandamus* immediately, if it considers this option convenient and just" (memorandum of fact and law, paragraph 16). It is in fact inappropriate to request new findings now, while the only valid proceeding before this Court is an appeal of a decision made by a prothonotary, before whom the issue was not raised. But more critically, the applicant gives the text of section 44 a meaning that is in neither its wording nor the case law. It merely gives this Court jurisdiction that it might not have if the final outcome of the litigation did not occur before this Court. In *Canadian Liberty Net*, the final outcome was before the Human Rights Tribunal; in *Brotherhood*, the final outcome will be determined under the *Canada Labour Code* before an administrative body. In both cases, similar provisions gave the Federal Court and the Supreme Court of British Columbia jurisdiction to allow one of the remedies possible under both sections.

[47] Essentially, the applicant is seeking a *mandamus* and seems to believe that section 44 has an extraordinary scope allowing the Court to overlook all rules; but all it does is grants jurisdiction. According to the Court in *Yellowquill v. Assiniboine/Myran*, (1995) 93 FTR 310, section 44 cannot even be invoked correctly against a federal office. Only section 18.1 is appropriate. Without going as far in our case, I fail to see how section 44 could be of any use to the applicant in distinguishing its amendment application to include a *mandamus* application for

judicial review. In both cases, it is seeking a *mandamus* remedy. In terms of proceedings, rule 302 encounters the same problem.

[48] Unfortunately for the applicant, section 44 does not have the magical properties it is trying to give it. It is entirely unclear how this section can help allow an amendment to the original proceedings to add a *mandamus* remedy and thus avoid a head-on collision with rule 302. The Federal Court's jurisdiction to allow a remedy, like for example in *Canadian Liberty Net*, in no way changes the requirement to divide remedies. The refusal to do so has not been demonstrated to be a palpable and overriding error.

VI. Conclusion

[49] The only issue before this Court is to determine whether the prothonotary, in exercising his discretion to disallow the amendment sought, made a palpable and overriding error. The applicant wanted to add *mandamus* findings to what was a *certiorari* application for judicial review. He refused because the requested amendment would not help determine the issues related to a *certiorari* proceeding to overturn an order. Moreover, the *mandamus* findings are in conflict with rule 302. The applicant failed to discharge its burden of demonstrating a palpable and overriding error in refusing an amendment.

[50] Once the nature and scope of section 44 of the *Federal Courts Act* is understood, this section is of no use to the applicant. It adds nothing to the amendment application, which seeks to add a *mandamus* to force the adoption of regulations in a *certiorari* application for judicial review to overturn an order. Section 44 grants the Federal Court jurisdiction where it might not

otherwise have it to order, for example, remedies such as injunctions to stop actions while an administrative tribunal reviews certain cases to arrive at a final decision (subject to judicial review, of course). One might think it would be the same for applications to grant a writ of *mandamus* to force an action upon an administrative tribunal while waiting for a final decision on its part. But the issue conditions would need to be presented and demonstrated.

[51] Lastly, there was no palpable and overriding error in the prothonotary's refusal to allow certain evidence on the decreased value of the applicant's property once the amendment seeking a *mandamus* was denied. This evidence is irrelevant to the issue of whether the order is illegal, since the decrease in value has no effect on the nature of the issues to resolve through judicial review.

[52] The appeal of Prothonotary Morneau's March 27, 2017, decision is dismissed. Costs assessed in accordance with rules 407 and 405 are awarded to the respondents.

Judgment in file T-1190-16

THE COURT'S JUDGMENT is that the appeal of Prothonotary Morneau's decision is dismissed, with costs awarded to the defendants.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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