Federal Court  Cour fédérale

Date: 20180320

Docket: T-1720-17

Citation: 2018 FC 322

Ottawa, Ontario, March 20, 2018

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

HUGH MACKENZIE

Applicant

and

TRANSPORTATION SAFETY BOARD OF CANADA

Respondent

ORDER AND REASONS

[1] The Applicant brings this motion "on an emergency basis" for a special hearing date on short service pursuant to Rules 8, 35, 147 and 362. He seeks an order to obtain an interlocutory injunction pursuant to section 50 of the *Federal Courts Act*, RSC, 1985, c F-7 to enjoin the Respondent from making use of evidence obtained by means of a warrant issued in the Ontario Court of Justice on March 2, 2018, until the hearing of the underlying judicial review proceeding in this Court scheduled for April 3, 2018.

[2] The Applicant Hugh Mackenzie is an individual, employed by Kingston and the Islands Boatlines Ltd. [KTI]. KTI is a tour boat operator in the Kingston, Ontario area. KTI is the owner and operator of the vessel Island Queen III [the Vessel].

[3] On August 8, 2017, the Vessel was involved in a "marine occurrence", as defined by the Act whereby she touched bottom [the Occurrence] and sustained water ingress in a stern compartment.

[4] In the course of the Transportation Safety Board of Canada [the TSB] investigating the Occurrence, the owners/operators of the Vessel refused to provide information requested by the TSB investigators requested by a summons issued pursuant to subparagraph 19(9)(*a*)(i) of the *Canadian Transportation Accident Investigation and Safety Board Act*, SC 1989, c 3 [the Act]. The summons was for the purpose of obtaining relevant information for the purpose of the investigation. It consisted of the names and contact information for eyewitnesses who were passengers on the Vessel at the time of the Occurrence, and contact information for employees of KTI, who the investigators wished to interview in connexion with the incident [the "relevant information"].

[5] Subparagraph 19(9)(*a*)(i) [with the Court's emphasis], reads as follows:

(9) An investigator who was investigating a transportation occurrence may	(9) Dans l'exercice de ses fonctions, l'enquêteur peut, après en avoir averti l'intéressé par écrit :
(a) where the investigator believes on reasonable grounds that a person is in possession	a) exiger de toute personne qui, à son avis, est en possession de renseignements ayant rapport à

of information relevant to that investigation, (i) by notice in writing signed by the investigator, require the person to produce information to the investigator or to attend before the investigator and give a statement referred to in section 30, under oath or solemn affirmation if required by the investigator, and [the summons].	son enquête la communication de ceux-ci — notamment pour reproduction totale ou partielle, selon ce qu'il estime nécessaire — ou obliger cette personne à comparaître devant lui et à faire ou remettre la déclaration visée à l'article 30, sous la foi du serment ou d'une déclaration solennelle s'il le demande;

[6] Instead of complying with the summons, on November 10, 2017 the Applicant filed the underlying Amended Notice of Application for Judicial Review seeking a declaration that the summons is unlawful. The Applicant claims the summons was invalid for the purpose of obtaining the relevant information, because it exceeded the TSB's authority, or alternatively, the TSB failed to provide reasons for the alleged reasonable belief that the information was relevant to the Occurrence. The Applicant also raises the constitutional validity of the summons pursuant to section 8 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. As noted, the application is to be heard on April 3, 2018.

[7] On March 2, 2018, the TSB acted pursuant to subsection 19(3) of the Act by obtaining an *ex parte* warrant issued by the Ontario Criminal Court to seize the same material that is the subject of the judicial review from the offices of KTI. The warrant was executed on March 6, 2018.

[8] Section19(3) [with the Court's emphasis], reads as follows:

(3) Where a justice of the peace is satisfied by information on oath that an investigator believes on reasonable grounds that there is, or may be, at or in any place, anything relevant to the conduct of an investigation of a transportation occurrence, the justice may, on *ex parte* application, issue a warrant signed by the justice authorizing the investigator to enter and search that place for any such thing and to seize any such thing found in the course of that search.	(3) S'il est convaincu, sur la foi d'une dénonciation sous serment, qu'un enquêteur a des motifs raisonnables de croire à la présence en un lieu d'un objet ayant rapport à une enquête sur un accident de transport, le juge de paix peut, sur demande *ex parte*, signer un mandat autorisant l'enquêteur à perquisitionner dans ce lieu et à y saisir un tel objet.

[9] The TSB was requested, but refused to abstain from making use of the seized material before the hearing of the judicial review application. There has been no indication what use the TSB has made or intends to make of the seized material.

[10] As such, the Applicant seeks an interlocutory injunction order enjoining the TSB "from making use [the Court's emphasis] of evidence collected pursuant to a warrant obtained in the Ontario Court of Justice […] until a determination is made in this proceeding concerning the statutory authority of the TSB to make use of such evidence."

[11] The Respondent argues that the Court has no jurisdiction to grant the injunction. It submits that this "would render the warrant issued by the Ontario Court of Justice a nullity, such

that the motion constitutes an impermissible collateral attack on the warrant that was lawfully issued by the Justice of Peace […]". The Respondent further argues that the underlying application is now moot, as the TSB has obtained the documents requested by the summons, and that in any event, the Applicant lacks the grounds for granting the injunction.

[12] As the Court's jurisdiction is being challenged, it must first consider this issue, which if accepted, would bring this matter to an end entailing the obvious rejection of the Applicant's motion.

[13] The Court sets out paragraphs 25 to 27 from the Respondent's memorandum [including the emphasized passages] that cites the jurisprudence that largely informs this decision in support of the argument that the requested injunction is an impermissible collateral attack on the warrant issued by the Justice of Peace:

> 25. In *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at p. 599, a case involving collateral proceedings in which the validity of a search warrant was questioned, Dickson J. (as he then was, writing for the majority) held that:
>
> > [i]t has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally – and collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment: *Wilson v The Queen*,.
>
> 26. In the companion appeals of *Canada (Attorney* General) v. *Siggelkow*, 2012 FCA 123 at para 18 [*Siggelkow*], *Canada (Attorney General) v. Blerot*, 2012 FCA 124 and *Canada (Attorney General) v. Lewry*, 2012 FCA 125, the Federal Court of Appeal

> specifically held [applying to all three cases], on the strength of the above-cited passage from Wilson, that:
>
> > [o]n the facts of this case, the search warrants issued by the provincial authorities are orders. These orders must be challenged in the forum in which they were made, using the procedures available in that forum. In an application to the provincial courts to quash these warrants or to exclude the evidence seized under the authority of these warrants, the applicability of the decisions *F.K. Clayton, Multiform* and *Grant* can be argued. However, it is not for the Federal Court, nor this Court to decide these issues so as to purport to bind the provincial courts.

[14] It is trite law that an interlocutory injunction is for the purpose of maintaining the status quo in respect of possible prejudice to allow the issue raised in the underlying proceeding to be considered without the prejudice occurring before the verdict is rendered. In this vein, the Court notes that the Applicant submits that the underlying judicial review will consider "the statutory authority of the TSB to make use [the Court's emphasis] of such evidence [the relevant information obtained by means of the warrant]". In the Court's view this does not accurately state the issue or the remedy sought by the application. Rather the application is brought to determine whether the TSB could issue a summons requiring the Applicant to attend and deliver the relevant information, in effect upholding his refusal to provide the information contrary to subparagraph 19(9)(*a*)(i).

[15] No issue is raised in the application with respect to preventing the use of any relevant information, as the fact scenario underlying the application was based upon the TSB not being in the possession of the information. Thus, the most evident obstacle to granting the interlocutory injunction is premised on a remedy not requested in the application. In order to obtain a remedy

preventing the TSB from using the relevant information obtained by the warrant, the Applicant would need to amend the application to introduce facts concerning the *ex parte* warrant and argue that the warrant was illegally obtained on the same basis as that of the summons. This amendment would not be granted because of the obvious lack of jurisdiction of the Court explicitly to set aside an order of an Ontario Court contrary to the Respondent's jurisprudence cited above.

[16] Instead of seeking to amend its application, the Applicant argues implicitly that a declaration limited to the legality of the summons should have an ancillary, but similar indirect impact, perhaps as a form of issue estoppel, on the legality of the Ontario warrant, therefore preventing use of the relevant information unlawfully obtained by the TSB. This is premised on the fact that the procedures to obtain the relevant information in both cases are based on the same legal test or requirement that the information obtained be relevant to the investigation. Thus, the Applicant argues in both cases that the procedure was overbroad of what constitutes the statutory definition of an "occurrence", or that the meaning of "relevant" should be read down on constitutional grounds.

[17] However, the result would be exactly the same as if the application was amended to directly attack the warrant. The Applicant would have successfully undermined the basis for issuing the warrant, without ever having to engage legal proceedings in the Ontario Courts to attain that objective. This is precisely the definition of a collateral attack by which an objective that cannot be achieved directly, is attained indirectly by means of another proceeding, and in this case, in an entirely different juridical jurisdiction.

[18] In addition, even without considering the underlying application, the Court cannot distinguish between an order limiting the use of the relevant information obtained by the warrant, from that of impounding it, as a collateral attack on the warrant. An order impounding documents pending a determination on the merits would have to be obtained in the provincial courts as per the *Siggelkow* line of cases described above. See for example: *R v Lee*, [2006] OJ No 3154; 82 OR (3d) 142.

[19] Having concluded that the Court has no jurisdiction to provide the remedy sought, it nevertheless is prepared to voice its concerns about the use of the warrant to undermine an appropriately engaged judicial review proceedings at a time approaching the 11th hour to the upcoming hearing of the application. No explanation has been provided for why the decision to obtain a warrant could not have been taken closer to sometime after October 2017, when the application was filed, as opposed to March 2, 2018. This would have avoided the urgency of this matter, not to mention most of the procedures in the judicial review application that preceded it.

[20] The Applicant raised the issue of abuse of process in the Notice of Motion without providing particulars. Neither did it make submissions on the point in its memorandum of argument, or at the hearing, as it was directed entirely to the jurisdictional issue. It might be noted that the Court is of the view that it cannot determine an issue of an abuse of process caused by a statutorily authorized procedure in another court, in another jurisdiction. The Court must also take care not to presume questionable procedures for which there may be a logical explanation, although none come easily to mind, besides the late recognition of an alternative

route to obtain the documents and provide grounds to argue that the judicial review proceedings are moot.

[21] Nevertheless, the Court raises the issue, because in considering the timing of the *ex parte* warrant, it concludes that it would be inappropriate to award costs in this matter, despite dismissing the motion for the injunction. Somewhat related to this conclusion not to award costs is the Court's understanding that these issues will shortly be re-canvassed before the Ontario Superior Court, whereby most of the costs engaged in this proceeding will not be thrown away. And in accordance with the Respondent's request, an extension of time to file the respondent's record is extended to March 23, 2018.

ORDER in T-1720-17

THIS COURT ORDERS that:

1. the motion is dismissed;

2. The time to file the Respondent's Record is extended to March 23, 2018; and

3. No costs are awarded.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1720-17
STYLE OF CAUSE:	HUGH MACKENZIE v TRANSPORTATION SAFETY BOARD OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 15, 2018
ORDER AND REASONS:	ANNIS J.
DATED:	MARCH 20, 2018

APPEARANCES:

Alan S. Cofman	FOR THE APPLICANT
Barbara McIsaac Patrizia Huot	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fernandes Hearn LLP Toronto, Ontario	FOR THE APPLICANT
Barbara McIsaac Law Ottawa, Ontario	FOR THE RESPONDENT