Federal Court  Cour fédérale

Date: 20210927

Docket: T-814-21

Citation: 2021 FC 998

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 27, 2021

PRESENT: The Honourable Mr. Justice McHaffie

BETWEEN:

ARCELORMITTAL EXPLOITATION MINIÈRE CANADA S.E.N.C.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

MINING ASSOCIATION OF CANADA, QUÉBEC MINING ASSOCIATION, MINING ASSOCIATION OF BRITISH COLUMBIA AND SASKATCHEWAN MINING ASSOCIATION

Interveners

ORDER AND REASONS

I. Overview

[1] The Attorney General of Canada is seeking a temporary stay of the present application for judicial review until November 30, 2021, a period of approximately nine weeks. The motion is based on an expected decision by Environment and Climate Change Canada (ECCC) in relation to the case. ArcelorMittal Exploitation minière Canada SENC opposes the motion, citing its lack of timeliness, the impact of the requested stay on ArcelorMittal and the declaratory nature of the application for judicial review, including its so-called preventative function.

[2] The sole issue before the Court is whether it is in the interests of justice to temporarily stay the application.

[3] For the reasons that follow, I am granting the Attorney General's motion. Given the current status of the case, the nature of the application for judicial review, the ECCC decision that is expected by late October, and the balance of benefits and harms, I conclude that the requested stay is in the interests of justice.

II. Facts

A. *Notice of Intent, process before Officer*

[4] The application for judicial review was filed by ArcelorMittal in response to a "Notice of Intent to Issue a Direction" [the Notice of Intent] dated September 24, 2020. The Notice of Intent was sent by an inspector and fishery officer of the Environmental Enforcement Branch of ECCC

[the Officer]. It was addressed to ArcelorMittal and two other companies, and to 11 employees of the three companies.

[5] Attached to the Notice of Intent is a proposed direction purportedly under subsection 38(7.1) of the *Fisheries Act*, RSC 1985, c F-14. The proposed direction is long, detailed and fairly complex, dealing with the Mont-Wright mine site and the alleged deposit of effluent containing deleterious substances into water frequented by fish. The Notice of Intent accompanying the proposed direction is one page in length. It reads as follows:

> [TRANSLATION]
>
> The person(s) listed above are referred to as "you" in this document.
>
> **PURPOSE OF NOTICE OF INTENT**
>
> The purpose of this Notice of Intent is to notify you that I, the undersigned inspector and fishery officer, intend to issue the attached direction to the aforementioned persons.
>
> The authority to issue a direction is set out in subsection 38(7.1) of the *Fisheries Act*.
>
> **OPPORTUNITY TO MAKE ORAL REPRESENTATIONS**
>
> You are being given a reasonable opportunity in the circumstances to make oral representations in relation to the proposed direction.
>
> Participation in and statements given at oral representations are voluntary.
>
> Oral representations enable you to provide information about the alleged contraventions or the contents of the attached direction or both.
>
> Should you choose to make oral representations, I, the undersigned, inspector and fishery officer, will consider them and will decide whether or not to issue the proposed direction, modify or issue as is.

> Please contact me by October 1, 2020, to confirm whether you plan to take advantage of the opportunity to make oral representations.
>
> If you wish to make oral representations and plan to bring any written documents to my attention at that time, please bring copies of the documents for my records.

[6] The Notice of Intent bears the Officer's signature and includes the Officer's contact information.

[7] On October 1, 2020, ArcelorMittal sent a request to ECCC for a copy of the [TRANSLATION] "record of decision" for the Notice of Intent, which was sent to ArcelorMittal between December 2020 and January 2021 (ArcelorMittal claims that it did not receive the complete record until February 11, 2021; however, the exact date is irrelevant). A few date changes were made, and a hearing to receive ArcelorMittal's oral submissions was scheduled for April 13 and 14, 2021. ArcelorMittal also took up ECCC's offer to make written submissions. In early April, the hearing was postponed to June 15, 2021, at the request of ArcelorMittal.

[8] On May 17, 2021, ArcelorMittal filed the notice of application for judicial review in this case.

[9] ArcelorMittal then asked ECCC to further postpone the presentation of its submissions in light of the application for judicial review. The Officer refused this request. ArcelorMittal filed written submissions on June 11, 2021, provided documents to ECCC on June 14, 2021, and made oral submissions at the meeting on June 15, 2021.

B. *Application for judicial review, process before this Court*

[10] ArcelorMittal's application for judicial review does not seek to set aside the Notice of Intent. Rather, it seeks a declaratory judgment in response to the Notice of Intent. The nature of the orders sought is summarized in the following paragraphs from the Notice of Application for Judicial Review:

> [TRANSLATION]
>
> 4. First, ArcelorMittal asks this Court to declare that the inclusion of ArcelorMittal's officers and partners in the Proposed Direction is unlawful, since a direction issued under subsection 38(7.1) of the Act may be issued only to the persons specifically referred to in that subsection, that is, those referred to in paragraphs (4)(a) or (b), (4.1)(a) or (b), or (5)(a) or (b) of section 38 of the Act.
>
> 5. Second, ArcelorMittal asks this Court to declare that the measures associated with submitting a new rehabilitation and restoration plan for the mine and with providing financial guarantees are constitutionally invalid because the pith and substance of these measures pertains to the management of non-renewable natural resources in a province. In the alternative, ArcelorMittal requests that these measures be declared constitutionally inapplicable.
>
> [Emphasis added.]

[11] With respect to the second of the two requests above (paragraph 5), ArcelorMittal served a notice of constitutional question, as required by section 57 of the *Federal Courts Act*, RSC 1985, c F-7.

[12] ArcelorMittal served its evidence in July 2021 after seeking an extension of time with the consent of the Attorney General. In addition, under section 7 of the *Federal Courts Rules*, SOR/98-106, the parties agreed to extend the time for serving the Attorney General's affidavits

to August 30, 2021. Meanwhile, the interveners, namely the mining associations of Canada, Quebec, British Columbia and Saskatchewan, sought leave to intervene.

[13] On August 25, 2021, the Attorney General filed a letter with the Court stating that it intended to bring a motion to stay the proceedings. The Attorney General requested that the mining associations' motion to intervene, scheduled for August 31, 2021, be adjourned as a result. ArcelorMittal and the mining associations objected to the request. Justice Roy of this Court refused the request for an adjournment because the Attorney General's proposed motion was, at that point, still uncertain. Justice Roy granted the motion to intervene on September 1, 2021.

C. *Attorney General's motion for stay*

[14] On September 8, 2021, the Attorney General brought the motion to stay the proceedings. None of the interveners took a position on the Attorney General's motion.

[15] The motion to stay is based on ECCC's determination in August that the Officer will decide whether to issue a notice [TRANSLATION] "towards the end of October 2021". As set out in the Notice of Intent, the decision will confirm whether a direction under the *Fisheries Act* will be issued and, if so, the contents of the direction.

[16] The Attorney General submits that, until the decision is made, there is no [TRANSLATION] "conflict" that would warrant a declaratory judgment. The Attorney General submits that the application for judicial review short-circuits the administrative process and is in effect

premature. Moreover, the final direction may render one or more issues raised in the application moot. The Attorney General submits that a stay would enable the parties and the Court to understand the scope of the proceedings and avoid costs in the interim.

[17] Meanwhile, ArcelorMittal submits that it is entitled to seek a declaratory judgment and that this does not short-circuit the administrative process. It submits that major, immediate consequences will occur if a direction is issued and that it should not be forced to wait for the final direction. In this regard, ArcelorMittal relies on the decision of Justice Nadon, when he was a member of this Court, in *Larny Holdings*, which I will discuss below (*Larny Holdings Ltd v Canada (Minister of Health)*, 2002 FCT 750). ArcelorMittal cites the [TRANSLATION] "preventative" function of a declaratory judgment and emphasizes the lack of real prejudice to the Attorney General if a stay is not granted. By contrast, it claims that it would suffer significant prejudice, namely the possibility of having to comply with a direction containing constitutionally invalid measures for a longer period.

III. Analysis

A. *Analytical framework for temporary stay of proceedings*

[18] In *Mylan*, Justice Stratas of the Federal Court of Appeal noted the distinction between a stay order that enjoins another body from exercising its jurisdiction and a stay order that results in the Court refraining from exercising its own jurisdiction until some time later (*Mylan Pharmaceuticals ULC v AstraZeneca Canada, Inc*, 2011 FCA 312 at para 5). This motion is of the second type.

[19] For motions of this type, "broad discretionary considerations" and the factual circumstances presented to the Court come to bear in the Court's decision (*Mylan* at para 5; *Coote v Lawyers' Professional Indemnity Company*, 2013 FCA 143 at paras 11–12). These considerations include the public interest in having proceedings move fairly and with due dispatch; the general principle of applying the Rules to secure a just, expeditious and cost-effective determination of a proceeding; the length of the stay being sought; the reason for seeking the stay; the potential for wasting resources; and the prejudice or inconvenience to the parties should the stay be granted or refused (*Mylan* at para 5; *Coote* at paras 12–13; *Clayton v Canada (Attorney General)*, 2018 FCA 1 at paras 7, 28; *Federal Courts Rules*, s 3).

B. *Requested stay in interests of justice*

[20] I will begin my analysis of the relevant factors with three remarks. First, I note that this motion is not a motion to strike, even though the Attorney General raises the issue of prematurity, which is often the basis for that type of motion. Therefore, I am not determining the issue of prematurity in the sense of whether the application may be heard or should be struck. Nevertheless, I find that the principles of prematurity and the nature of the application for judicial review are relevant in exercising discretion to grant a temporary stay.

[21] Secondly, this motion is also not a motion for an indefinite or long-term stay. The issues of prejudice and the interests of justice must be considered in the context of the motion brought, which is a motion for a stay of approximately nine weeks.

[22] Thirdly, I note that the Attorney General's motion does not challenge this Court's jurisdiction to issue the declarations that ArcelorMittal is seeking. ArcelorMittal pointed out in its submissions that the Court has jurisdiction to hear the case and allow the application; however, that jurisdiction is not at issue in this motion.

[23] Analyzing the interests of justice in this context, I find that the following factors weigh against the requested stay:

- The timing of the motion: The Attorney General brought the motion after ArcelorMittal had filed its affidavits under section 306 of the *Federal Courts Rules* and after the deadline for filing his own affidavits under section 307, which was August 30, 2021. Although the Attorney General provided notice before that date of his intention to file the motion, the costs that the Attorney General wants to delay or avoid are primarily his own. The Attorney General submits that he was not in a position to request a stay until ECCC had confirmed that the decision would be made shortly. Although I can appreciate this argument, I nevertheless find that the late filing of the motion violates a sense of "fairness" and therefore weighs against the stay.

- A lack of material prejudice should the stay not be granted: The Attorney General is effectively seeking to delay or avoid filing its affidavits and perhaps the costs and inconvenience of cross-examination, suggesting that at least some of these costs may be unnecessary depending on the final decision. As ArcelorMittal argues, these costs are merely routine litigation costs, and the prejudice to the Attorney General if the stay is not granted is not substantial.

[24] However, I find that the factors above are outweighed by the factors that weigh in favour of the requested stay. These factors are as follows:

- The fairly short duration of the requested stay: The Attorney General is seeking a stay of approximately nine weeks. Although an application for judicial review should be heard without delay and in a summary way, two months will not unduly delay the application (*Federal Courts Act*, s 18.4(1); *Mylan* at para 5).

- The current status of this case: The application is still in its early stages. The Attorney General has not filed his affidavits. Any necessary cross-examination has not taken place. A hearing has not been ordered, and the case is therefore not expected to be heard before 2022. A number of stages must be completed before that date.

- The fact that, in any event, the Officer's final decision will be rendered by the end of October: The Officer refused ArcelorMittal's request to await the determination of the application for judicial review, and no stay was sought or issued. Therefore, the application for judicial review cannot have a "preventative" function with respect to the issuing of the Officer's decision or a final direction because there is no likelihood that the Court will determine the application in the coming nine weeks.

- The legal costs, albeit modest, that could be saved should the final decision render the application for judicial review moot, in whole or in part: ArcelorMittal has made submissions to the Officer, and her final direction may address or alter one or more of the issues raised in the application.

- A lack of material prejudice to ArcelorMittal: The prejudice alleged by ArcelorMittal is largely hypothetical because the final decision will be rendered shortly.

- The nature of the application for judicial review: Even if the Attorney General's motion is not struck, I find it to be a fairly significant consideration in a motion for a stay to await the final decision that the application is effectively for judicial review of an interlocutory stage of an administrative process.

[25] The last two points above will be considered in more detail below, given their particular importance in the exercise of my discretion.

(a) *Lack of prejudice to ArcelorMittal*

[26] The main prejudice identified by ArcelorMittal is that it [TRANSLATION] "may have to comply with a direction containing constitutionally invalid or inapplicable measures for a longer period". It claims that the requested stay will remove or at least delay its access to the justice system. As I have stated, ArcelorMittal will receive the Officer's final decision and direction, if a direction is issued, by the end of October, whether or not a stay is granted. The "period" to which ArcelorMittal refers will therefore begin when it receives the decision. It would be "longer" only if it is assumed that the requested stay will delay the hearing date of the application.

[27] The requested stay may in theory delay the hearing date by nine weeks. However, ArcelorMittal did not request an accelerated timetable or an expedited hearing date to ensure that the application would be determined as soon as possible. If ArcelorMittal believes it has cause to

request an expedited hearing after receiving the final decision, it could apply to the Court. All this to say that the supposed lengthening of the period is more or less speculative.

[28] Moreover, the application for judicial review does not, and cannot, seek to set aside a direction that has yet to be issued. Therefore, it is only in theory that the application would shorten the period during which ArcelorMittal would have to comply with the direction, even if ArcelorMittal is successful in its case.

[29] ArcelorMittal also raises the argument that the individuals to whom the Notice of Intent and the proposed direction are addressed could be subject to the allegedly unconstitutional and *ultra vires* direction. Again, if a final direction is issued to the individuals in question, it will be issued regardless of whether a temporary stay is granted. In other words, any major, immediate consequences of a direction being issued will occur because the direction was issued, not because the application was stayed.

[30] I also disagree with ArcelorMittal's argument that the requested stay [TRANSLATION] "would deprive ArcelorMittal of the very possibility of presenting its case before a court and obtaining the Court's guidance on the legality of the measures infringing its rights". Staying this application for approximately nine weeks would in no way deprive ArcelorMittal of the opportunity to present its case.

[31] Almost every motion for a stay raises, to some extent, the public interest and the interest of the applicants in having proceedings move with due dispatch. That said, even if one agrees

that “justice delayed is justice denied”, I am not persuaded that hypothetically holding a hearing a few weeks later in 2022 demonstrates any material prejudice to ArcelorMittal.

(b) *Prematurity of application for judicial review*

[32] This leads me to the issue of the nature of the application for judicial review, which I consider to be important in the exercise of my discretion.

[33] The application is for declaratory orders on major issues of constitutionality and the rights of ArcelorMittal and its officers and partners. ArcelorMittal claims that, for this reason, the application is not premature and may be commenced even if the Notice has no legal effect.

[34] In my opinion, the application and the remedies sought must be considered in their administrative context.

[35] The Officer has the power to order corrective measures to counteract, mitigate or remedy the harmful alteration of fish habitat (*Fisheries Act*, s 38(7.1)). Before issuing an order, the Officer gave the recipients notice and an opportunity to make submissions. ArcelorMittal made submissions. These are not before the Court in the context of this motion, but ArcelorMittal frankly admits that there was no reason that its submissions could not include arguments regarding constitutional questions and the Officer’s jurisdiction under the *Fisheries Act*.

[36] We are currently waiting, as we have been since ArcelorMittal filed its submissions with the Officer, for a final decision and the final direction, if any. In its application for judicial

review, ArcelorMittal asks the Court to determine certain issues before, or at least independently of, the Officer's final decision.

[37] In my opinion, this is precisely the type of application that is discouraged by the "principle of judicial non-interference with ongoing administrative processes" (*Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at para 30). The Court of Appeal has repeatedly stated that the Federal Courts, like other courts, normally will not exercise their supervisory powers until the administrative process established by Parliament has been completed (*Zündel v Canada (Human Rights Commission)*, [2000] 4 FC 255 at paras 10–17; *CB Powell* at paras 28–33; *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paras 83–88; *Forner v Professional Institute of the Public Service of Canada*, 2016 FCA 35 at paras 11–17; *Dugré v Canada (Attorney General)*, 2021 FCA 8 at paras 34–37). An application for a measure or decision that is interlocutory, that is, before the final decision, is premature and normally will not be heard (*JP Morgan* at para 88; *CB Powell* at para 31; *Dugré* at paras 37–38).

[38] ArcelorMittal claims that its application for judicial review is not premature for four main reasons.

[39] First, ArcelorMittal relies on the fact that an application for judicial review can be made not only in respect of a decision, but also in respect of an "act or proceeding" of a federal board, commission or other tribunal (*Federal Courts Act*, s 18.1(3)(b); *Krause v Canada*, [1999] 2 FC 476 (CA) at paras 21–23). In *Larny Holdings*, the Court confirmed that it may hear an

application for judicial review and grant a declaratory judgment even in respect of a “direction” that has no legal effect if there is “a real and live dispute between the parties” (*Larny Holdings* at paras 1, 24–25, 33). ArcelorMittal claims that the current situation is at the [TRANSLATION] “same stage” as in *Larny Holdings*.

[40] I disagree. The current situation, including the status of the administrative process, is not parallel to the situation in *Larny Holdings*.

[41] In *Larny Holdings*, Health Canada sent an initial letter to tobacco retailers stating that selling multiple packs of cigarettes (not in a carton) for a lower price per pack than that charged on the sale of single packs contravened the ban on “cash rebates” in section 29 of the *Tobacco Act*, SC 1997, c 13. The initial letter also stated that Health Canada would send warnings to retailers who continued to contravene section 29 (*Larny Holdings* at paras 8–9). A second letter, the advance warning letter referred to as a “direction” by the applicant, was then sent to the applicant. This letter reiterated Health Canada’s position, noted that any retailer who contravened section 29 was guilty of an offence and asked the applicant to take the necessary steps to avoid contravening the Act (*Larny Holdings* at paras 1, 10–11). The applicant changed the prices accordingly and brought an application for judicial review. The Court found that the application was not premature and that the applicant was not required to wait for a criminal prosecution before seeking a declaration from the Federal Court (*Larny Holdings* at paras 29–34).

[42] Indeed, there was no longer an administrative process in *Larny Holdings*. Health Canada had sent its final letter, and the next step would have been to lay charges. There was no other

"final" stage or decision that could be the subject of an application for judicial review. This is not the case here. On the contrary, the Officer will render her final decision, which may be the subject of an application for judicial review before this Court. This distinction, between a decision or other measure that is effectively final and one that is not, is crucial.

[43] Moreover, I disagree with ArcelorMittal's assertion that the Notice of Intent is "coercive" like the direction at issue in *Larny Holdings*. Unlike Health Canada in its direction, the Officer in this case specifically invited ArcelorMittal to make submissions on the draft direction and stated that they would be taken into account. Although the draft contains the required measures, it is clearly still a draft at this point. The Notice of Intent itself does not contain any required measures. Put another way, there is a big difference between a direction that says, "Do this", and a notice with a draft direction that says, "I intend to tell you what to do, but I will listen to your submissions first". The first is a direction; the second is simply a notice.

[44] I also conclude that *Global Marine*, on which ArcelorMittal relies, is not in its favour (*Global Marine Systems Ltd v Canada (Transport)*, 2020 FC 414 at paras 56–57, 71–86). In *Global Marine*, the company and Transport Canada exchanged numerous letters between May 2017 and June 2019 in which both parties clarified and reiterated their positions. During this "dialogue", Transport Canada sought submissions, discussions and meetings (*Global Marine* at paras 32–51). Finally, on June 20, 2019, Transport Canada sent an email that marked "the culmination of an extended discussion"; it stated Transport Canada's final position and concluded with the words "I trust that this concludes the matter" (*Global Marine* at paras 12, 52, 57). In light of this, Justice Strickland concluded that the final email was of the same nature as

the direction in *Larny Holdings* and could indeed form the basis of an application for judicial review (*Global Marine* at paras 70–85). Justice Strickland did not agree with Transport Canada's submission that the prior communications were also "decisions" and that the company was therefore out of time (*Global Marine* at para 86). Despite ArcelorMittal's assertions, I find that the Notice of Intent is not equivalent to Transport Canada's final email. The Notice of Intent did not mark the "culmination" of a discussion. Rather, it expressly invited further discussion and stated that the culmination, or final decision, was yet to come.

[45] *Larny Holdings* and *Global Marine* confirm that a final and coercive communication may be the subject of an application for judicial review, at least in some circumstances. However, this does not mean that any interlocutory communication can also form the basis of an application. If the principle of judicial non-interference with ongoing administrative processes applies to barring judicial review of an interlocutory decision, it applies even more to barring judicial review of a step that is not a decision, even if it is called an "act or proceeding" and even if the remedy sought is a declaratory judgment instead of a quashing or prohibition.

[46] Second, ArcelorMittal relies on the "preventative function" of declaratory judgments (*Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 457; *Larny Holdings* at paras 32–33). I have no doubt that a declaratory judgment can be a useful way of determining the rights of the parties and, in an appropriate case, of preventing unfounded or even unlawful acts or steps. However, it is not merely because a declaratory judgment may have a preventative function that it is available to prevent any administrative act. On the contrary, an order that seeks to prevent an administrative act is always likely to be counter to the principle of judicial non-interference with

ongoing administrative processes. It is not the form of an order sought in an application for judicial review (declaration, quashing, prohibition) that is determinative. In any event, as I stated earlier, the "preventative function" of the declarations sought is more hypothetical than real because the application will not prevent the Officer's final decision from being issued.

[47] Third, ArcelorMittal asserts that the Notice of Intent is a step that can "stand alone", that is, it is not necessarily linked to a final decision because the Officer is not compelled by the *Fisheries Act* to issue a final direction or decision. I cannot accept this argument. Whether or not the final direction is ultimately issued, the Notice of Intent is clearly a step in the process leading to a direction. Moreover, in the current situation, ECCC has confirmed that a final decision will be made; therefore, the uncertainty that ArcelorMittal fears is, or at least has become, quite hypothetical.

[48] Fourth, ArcelorMittal relies on the power of a tribunal to refer a question of law or jurisdiction to the Federal Court (*Federal Courts Act*, s 18.3). It submits that an imbalance in the [TRANSLATION] "equality of arms" would be created if a party could not also seek determinations from the Court on important issues. I disagree. To begin with, there is no issue of "equality of arms" between an administrative tribunal and a party subject to the administrative process. In the administrative context they are not "enemies", and in the context of an application for judicial review, at least before this Court, the tribunal is typically not a party. Contrary to ArcelorMittal's arguments, parties subject to administrative processes are not encouraged to [TRANSLATION] "seek the Court's guidance on specific jurisdictional issues" before the tribunal has decided the issue (*Dugré* at para 36).

[49] I reiterate that I am deciding the issue of prematurity only in relation to the requested stay. That said, I conclude that the nature of ArcelorMittal's application for judicial review is a fairly important factor in the analysis and in my conclusion that the requested stay is in the interests of justice.

IV. Conclusion

[50] Considering the relevant factors, I find that the requested stay is in the interests of justice.

[51] Lastly, I would point out that I considered the possibility of granting a shorter stay to minimize the adverse effects of the stay, even though they are already quite minimal. However, once the final decision is issued, the parties will need an opportunity to review it, consider it and make any necessary decisions about the application in light of it. I believe that the requested stay, to the end of November, is appropriate.

[52] Both parties have claimed their costs. Costs are awarded to the Attorney General regardless of the outcome of the application.

ORDER in T-814-21

THIS COURT ORDERS as follows:

1. The motion of the Attorney General of Canada is granted.
2. The application for judicial review is stayed until November 30, 2021.
3. The Attorney General of Canada, in consultation with the applicant and interveners, will file a proposed timetable for the remaining stages of the case, including at least the timetable for service of the Attorney General of Canada's affidavits, service of the interveners' affidavits, and cross-examination, on or before December 1, 2021.
4. Costs are awarded to the Attorney General of Canada, regardless of the outcome of the application.

"Nicholas McHaffie"
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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