Federal Court Cour fédérale

Date: 20120314

Docket: T-1974-11

Citation: 2012 FC 305

Montreal, Quebec, March 14, 2012

PRESENT: Richard Morneau, Esq., Prothonotary

BETWEEN:

ADVENTURE TOURS INC.

Applicant

and

ST. JOHN'S PORT AUTHORITY

Respondent

REASONS FOR ORDER AND ORDER

[1] This motion by the St. John's Port Authority (SJPA) derives from a challenge of a purported decision of the SJPA to refuse to grant a licence to the applicant, Adventure Tours Inc. (ATI), with respect to tour boat operations. The licence would permit ATI to carry on business as a tour boat operator with two vessels in St. John's Port.

[2] ATI is a seasonal tour boat operator. There is some dispute as to the term and nature of this relationship: ATI understands the relationship to be ongoing from 1986, while SJPA understands ATI to have last operated in the Port in 2005. Although not central to this motion, I retain for the

present purposes that the SJPA is correct in finding that ATI last operated in the Port in 2005. In addition, while the SJPA characterizes the licence request by ATI as one for a "seasonal retail boat service/ souvenir shop", I find that for the purposes of this decision while the service may incorporate elements of a "souvenir shop" or a "retail service" this cannot detract from its main function as a tour boat service for the transportation of passengers.

[3] On October 28, 2011, the ATI Captain, Charles Anonsen, wrote a letter to the SJPA inquiring after the requirement of a special licence in the hopes of resuming operation as a tour boat company. The relevant section of the letter reads as follows:

> It is my hope to resume my operations as a tour boat company for the next season, 2012. Will a special license be required, other than the Canadian Steamship Inspection Certificate, issued by Transport Canada?
>
> (Exhibit 1, Brian Scott Affidavit)

[4] In response to this inquiry, the SJPA President and CEO, Sean Hanrahan responded in a letter dated November 7, 2011, in part stating:

> With regard to your letter of October 28, 2011, I can advise that the SJPA currently has agreements in place with respect to tour boat operations in the port. We are neither seeking nor accepting proposals for additional operators at this time.
>
> (Exhibit 2, Brian Scott Affidavit)

[5] On judicial review, ATI asks that the Court set aside the SJPA's decision not to accept an application from the applicant for a licence on the grounds that the refusal contradicts the terms of section 27 of the *Port Authorities Operations Regulations*, SOR/2000-55 (the Regulations). ATI submits that subsection 27(2) of the Regulations provides for mandatory authorization of licences in

the absence of enumerated exceptions. ATI also requests a *mandamus* order directing that the SJPA issue a tour boat operating licence commencing in 2012.

[6] This motion to strike filed by the SJPA on December 22, 2011 maintains that the Court is without jurisdiction to hear ATI's application.

[7] In the Court's appreciation of the parties' positions, the following grounds are to be considered under this motion:

i. What is ATI's entitlement to carry on business in St. John's Port?
ii. Does the November 7, 2011 Letter amount to conduct susceptible to judicial review?
iii. Is the activity of ATI one or more of the primary purposes of the port described in paragraph 28(2)(*a*) of the *Canada Marine Act*, SC 1998, c 10 (the Act)? Was the SJPA acting as a "federal board, commission or other tribunal"?

(i) What is ATI's entitlement to carry on business in St. John's Port?

[8] ATI submits that as a port user conducting business involving the core function of the port, ATI has the right and entitlement to carry on that business and does not require the SJPA's "authorization, licence or permission" (collectively hereinafter referred to as "licence"). ATI argues that the SJPA has no jurisdiction or right to prohibit tour boat activities except as provided for in

Part 1 of the Regulations, and that subsection 27(2) provides for an automatic right for a user to sell its services.

[9] Under a motion to strike the Court will not determine what licence is required by a tour boat operator; nevertheless, I cannot agree that no licence is required. Not requiring a licence to authorize tour boat operations would prevent the Port from properly managing port activities; such a result would be illogical. The number of tour boats operating at any given time would be unpredictable, unmonitored and unconstrained. Captain Charles Anonsen's correspondence with the SJPA in October 2011 reveals that he too understands his conduct to require authorization. I find therefore that a licence is required, and do not believe that section 27 of the Regulations entitles ATI to a mandatory issuance. There is no automatic right to operate a tour boat in the Port.

(ii) Does the November 7, 2011 Letter amount to conduct susceptible to judicial review?

[10] The Court is aware that when deciding to grant a motion to strike on an application for judicial review the threshold to be met is very high. Such motions are only to be granted where the application is "so clearly improper as to be bereft of any possibility of success" (*David Bull Laboratories (Canada) v Pharmacia,* [1995] 1 FC 588, at para. 15). This is an exceptional remedy which can be relied upon only where the Court can determine that no further development of the factual record is required (*LJP Sales Agency v Canada (National Revenue)*, 2007 FCA 114, at para. 8).

[11] The SJPA submits that the correspondence complained of by the applicant was a letter, written in response to an expression of interest by the applicant, advising that the SJPA was not entertaining proposals at this time. The SJPA submits that this conduct does not trigger rights to bring judicial review, and in such an instance the application must be struck.

[12] In the recent *Air Canada v Toronto Port Authority*, 2011 FCA 347 (*Air Canada*), the Federal Court of Appeal determined that the presence of a "decision" or "order" is not required in order to bring a judicial review. The correct understanding of what can be brought by judicial review is articulated by the Court at paragraph 24:

> Subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by "the matter in respect of which relief is sought." A "matter" that can be subject of judicial review includes not only a "decision or order" but any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*: *Krause v Canada*, [1999] 2 F.C. 476 (C.A.). Subsection 18.1(3) sheds further light on this, referring to relief for an "act or thing," a failure, refusal or delay to do an "act or thing," a "decision," an "order" and a "proceeding." Finally, the rules that govern applications for judicial review apply to "applications for judicial review of administrative action," not just applications for judicial review of "decisions or orders": Rule 300 of the *Federal Courts Rules*.

[13] Accordingly, judicial review is appropriate in circumstances where conduct has triggered rights on the part of the applicant, for example legal rights, obligations or prejudicial effects (*Air Canada*, at paras. 26 and 29). Conduct which does not attract judicial review, as canvassed by *Air Canada*, includes situations such as a courtesy letter, or a non-binding opinion (*Philipps v Canada (Librarian and Archivist)*, 2006 FC 1378; *Rothmans, Benson & Hedges Inc v Minister of National Revenue*, [1998] 2 CTC 176).

[14] In my view, it can be seen from a review of the correspondence that the SJPA has done nothing to trigger the rights of ATI. ATI's letter asks the question: do I need a licence? To which the SJPA answers: we are not accepting applications right now. ATI did not make a formal request or submit an application, and the SJPA's response does not preclude future applications for a licence, or further inquiry; the SJPA merely informed the applicant as to the status of current licence processing. It is not disputed that the parties have had a tumultuous business relationship. On this basis alone, one would have expected ATI to have engaged such a communication with a measure of written precision, and made a more formal request. As presented, SJPA's letter of November 7, 2011 does not affect ATI's legal rights, impose a legal obligation, or cause prejudicial effects. The nature of the correspondence and the substance of the conduct complained of by ATI does not amount to conduct that could be subject to judicial review. Therefore, for the reasons expressed in paragraphs [11] – [14] herein, I have determined that the SJPA's motion to strike shall be allowed.

[15] However, in case I am wrong in this finding, and mainly anticipating a more formal request for licence issuance from ATI in the future and with an eye to judicial economy, I find it proper to address the issue of jurisdiction and whether or not the SJPA was acting as a "federal board, commission or other tribunal". On this basis, the following substantive reasoning is also part of the *ratio decidendi*.

(iii) Is the activity of ATI one or more of the primary purposes of the port described in paragraph 28(2)(*a*) of the Act? Was the SJPA acting as a "federal board, commission or other tribunal"?

[16] Subsection 18(1) of the *Federal Courts Act*, RSC 1985 c F-7 (*Federal Courts Act*), vests the Federal Court with jurisdiction to conduct judicial review over matters where relief is sought against any "federal board, commission or other tribunal". Section 2 of the *Federal Courts Act* provides the definition of "federal board, commission or other tribunal" as:

> … any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*.

[17] Where the decision challenged is not made by a "federal board, commission or other tribunal" the Federal Court has jurisdiction to strike an application. An organization subject to judicial review must be exercising a power of a public nature; the Federal Court does not have jurisdiction to review private powers (*DRL Vacations Ltd v Halifax Port Authority*, 2005 FC 860 (*DRL Vacations*), at para. 23). This is succinctly put by Justice Stratas in *Air Canada*, at paragraph 50,

> However, before us, the Toronto Port Authority submits that that alone is not enough to satisfy the requirement that an entity was acting as a "federal board, commission or other tribunal" when it engaged in the conduct or exercised the power that is the subject of judicial review. It has cited numerous cases to us in support of the proposition that the conduct or the power exercised must be of a public character. An authority does not act as a "federal board,

> commission or other tribunal" when it is conducting itself privately or is exercising a power of a private nature: …

[18] It is necessary therefore to determine whether or not the SJPA was acting as a "federal board, commission or tribunal" in corresponding with ATI about tour boat licences and also whether or not the power, the alleged refusal of a licence, is private or public in nature.

[19] In paragraph 60 of *Air Canada*, the Federal Court of Appeal provides a more detailed framework for jurisdiction analysis and presents the following relevant factors to determine public-private issues:

> 1. *The character of the matter for which review is sought*;
> 2. *The nature of the decision-maker and its responsibilities*;
> 3. *The extent to which a decision is founded in and shaped by law as opposed to private discretion*;
> 4. *The body's relationship to other statutory schemes or other parts of government*;
> 5. *The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity*;
> 6. *The suitability of public law remedies*;
> 7. *The existence of compulsory power*;
> 8. *An "exceptional" category of cases where the conduct has attained a serious public dimension.*

[20] No one factor is determinative, however, as outlined by the Court, "[w]hether or not any one factor or a combination of particular factors tips the balance and makes a matter "public" depends on the facts of the case and the overall impression registered upon the Court" (*Air Canada*, at para. 60). In this way, and although the review carried by the SJPA of factors 3, 4 and 6 to 8 of paragraph 60 of *Air Canada* might to varying degrees favour the position held by SJPA**,** after consideration, the Court has determined that an examination of the character of the matter at issue,

and the nature of the decision-maker and his responsibility brings the matter into the purview of public law.

[21] Consequently, for the following reasons, the overall impression on the Court is that the matter subject to review in this application is public in nature and in dealing with this matter, the SJPA was acting as a "federal board, commission or other tribunal".

(1) *The character of the matter for which review is sought*

[22] The SJPA submits that a decision to licence a seasonal retail boat service is a purely commercial decision incidental to the SJPA's main responsibilities of operating the port. The SJPA further submits that such a decision is in the nature of general powers of management, merely incidental to its legal personality and not reviewable by a court.

[23] The SJPA submits that the Court should follow Justice Mactavish in *DRL Vacations*, in finding that the competitive process to award licences to operate retail markets is a private, commercial matter. The SJPA submits that the licencing of a seasonal retail boat service under consideration in this application is materially indistinguishable from the activities considered in *DRL Vacations* and in *54039 Newfoundland and Labrador Ltd v St John's Port Authority*, 2011 FC 740 (*54039 Newfoundland*).

[24] At issue in *DRL Vacations*, was whether the Halifax Port Authority had operated as a "federal board, commission or other tribunal" in entering into negotiations to operate a souvenir

shop. In a direct and clear reference to the Act, Justice Mactavish uses the exact wording of paragraph 28(2)(*a*) to determine that a souvenir shop is a purely commercial enterprise. Subsection 28(2) of the Act states:

> (2) The power of a port authority to operate a port is limited to the power to engage in
>
> > (*a*) port activities related to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods, to the extent that those activities are specified in the letters patent; and
> >
> > (*b*) other activities that are deemed in the letters patent to be necessary to support port operations.
>
> [Emphasis added.]

[25] On this basis, Justice Mactavish concludes that the activities of a souvenir shop are "incidental to the HPA's main responsibility for managing port activities related to shipping, navigation, transportation of goods and passengers and the storage of goods" [Emphasis added] (*DLR Vacations*, at para. 55). Further, the activities delineated in paragraph 28(2)(*a*) of the Act are understood to be the core functions in the capacity and power of a port authority, and a souvenir shop is not so implicated.

[26] Similarly, in *54039 Newfoundland*, the Court found that for purposes of a restaurant the SJPA was not acting as a federal board, commission or other tribunal. Phrased another way, the souvenir shop, and the restaurant were not intimately connected to a port authority's core functions as described in paragraph 28(2)(*a*) of the Act (*54039 Newfoundland*, at para. 11).

[27] Given the discussion above, I find that the circumstances of this case are materially different than those canvassed in both *DRL Vacations* and *54039 Newfoundland*. In my view, operating a tour boat service for the transportation of passengers, even though it might not be a ferry service but just for the transportation of tourists is squarely in the realm enumerated by paragraph 28(2)(*a*) of the Act. Contrary to a restaurant or a souvenir shop, ATI's tour boat service is more intimately connected to a main responsibility of managing port activities.

[28] In paragraph 52 of *Air Canada,* Stratas J.A. notes that,

> For example, suppose that a well-known federal tribunal terminates its contract with a company to supply janitorial services for its premises. In doing so, it is not exercising a power central to the administrative mandate given to it by Parliament. Rather, it is acting like any other business. The tribunal's power in that case is best characterized as a private power, not a public power.
>
> [Emphasis added.]

[29] The proposed activity addressed in this application relates to something that can only be authorized by a port authority; this is not something "any other business" could do, but is an exclusive legislative mandate of the port authority. I find that the proper characterization of the matter is as a "tour boat service" – a port activity which is more than incidental to the SJPA's main management responsibilities – and that the character of the matter under review is public in nature.

(2) *The nature of the decision-maker and its responsibilities*

[30] The SJPA is a federal government business incorporated by letters patent pursuant to the Act. There is little dispute that as a port authority, the SJPA is operating largely independently of

government. However, under section 7 of the Act, port authorities are agents of Her Majesty in right of Canada for the purposes referred to in subsection 28(2) of the Act as delineated above. As I have already determined that a tour boat service is a core function pursuant to paragraph 28(2)(*a*) of the Act, in engaging in this activity the SJPA is acting as a Crown agent. This status is part of factor 5 of *Air Canada*, in support of the public character of a matter.

[31] The SJPA submits however that this is not determinative and that whether or not the SJPA is acting as a Crown agent is immaterial where the matter is not closely related to public responsibilities. Again, I find that as a core function, the licencing of tour boat operations is a public responsibility. I find that the SJPA is acting as a federal body with respect to awarding tour boat licences.

[32] I find the determinations above to be sufficient to establish that the application has a public nature, and that the SJPA was acting in a public capacity. Were it not for the conclusion of the Court under paragraphs [11] – [14], *supra*, judicial review would have been properly brought and the SJPA's motion to strike would have been dismissed.

[33] This Court does not intend to address the issues of procedural fairness or the discretionary nature of judicial review. These arguments would go to the merit of any application and are not properly addressed under a motion to strike.

[34] Nevertheless, as indicated at the end of paragraph [14], *supra*, the SJPA's motion to strike this application will be allowed.

ORDER

THIS COURT ORDERS that the SJPA's motion to strike ATI's application is allowed, the whole with costs.

"Richard Morneau"

Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

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