Federal Court of Appeal  Cour d'appel fédérale

Date: 20171012

Docket: A-72-17

Citation: 2017 FCA 206

CORAM: **WEBB J.A.**
BOIVIN J.A.
RENNIE J.A.

BETWEEN:

FRASER LEISHMAN and GRAY GREENWAY

Appellants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, as represented by THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE and PARKS CANADA AGENCY

Respondents

Heard at Edmonton, Alberta, on October 3, 2017.

Judgment delivered at Ottawa, Ontario, on October 12, 2017.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: WEBB J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

[1] We are seized of an appeal from a judgment of Locke J. of the Federal Court (the Judge) rendered on February 21, 2017 (2017 FC 206), whereby he disposed of two motions dealt with in writing.

I. Background

[2] Mr. Fraser Leishman and Mr. Gray Greenway (the appellants) both have cottages in the Waterton Townsite area. They disagree with a decision made by the Superintendent of Waterton Lakes National Park (the Relocation Decision), whereby he selected a new location for the Visitor Reception Center (the VRC). The chosen location for the VRC is in the Waterton town area, just by the entrance to the Waterton Townsite campground. The appellants became aware of the decision shortly after it was communicated to the public on Parks Canada's website on March 7, 2016 (appellants' application for judicial review, Appeal Book, Vol. 1, Tab 3 at p. 21).

[3] The appellants filed an application for judicial review eight (8) months later, on November 21, 2016. Since they were well outside the 30-day time limit imposed by the *Federal Courts Act*, R.S.C., 1985, c. F-7, the appellants brought a motion for an extension of time (Appeal Book, Vol. 1, Tab 5 at p. 45).

[4] As I understand the appellants' underlying judicial review application, they were in effect seeking review of more than one decision: (i) the Relocation Decision dated March 7, 2016; and (ii) eventual decisions contemplated in the Waterton Community Plan (Appeal Book, Vol. 1, Tab 5(f) at p. 122), whereby the Superintendent would issue a development permit and a building permit to give effect to the Relocation Decision. These "eventual" decisions, of course, have not yet been rendered. The importance of distinguishing between the Relocation Decision and possible decisions by the Superintendent in the future will be discussed below.

II. Motions before the Judge

[5] Two motions were before the Judge. One motion was filed by the appellants seeking an extension of time to commence an application for judicial review of the Relocation Decision outside the 30-day time limit. Their motion also requested an extension of time for future steps in their application, an order for the production of documents, and costs. Since the appellants had sought other relief, namely orders of prohibition, declaration and injunction, in their underlying judicial review application, Her Majesty the Queen in Right of Canada, as represented by the Minister of Environment and Climate Change and Parks Canada Agency (the respondents) brought a motion to have these items struck. Since the motions were interrelated, the Judge decided to address them in the same decision.

[6] The Judge dismissed the appellants' motion for an extension of time to commence an application for judicial review. Given the dismissal of the motion for a time extension, the Judge did not consider the other requests in the appellants' motion. The Judge granted the respondents' motion to strike other portions of the appellants' judicial review application.

III. Analysis

[7] In this appeal, the appellants submit that they raised the issue of nullity of the Relocation Decision before the Judge but that he failed to address it. They also appeal the Judge's disposal of the two motions. They contend that the Judge erred in applying the *Larkman* test for an extension of time as defined in *Canada (Attorney General) v. Larkman*, 2012 FCA 204, [2012]

F.C.J. No. 880 (QL) [*Larkman*] and that he made an error in granting the respondents' motion striking other portions of their judicial review application.

[8] In disposing of the two motions, the Judge rendered discretionary decisions. The review of a judge's discretionary decision attracts the standard of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, as recently decided by our Court in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331.

[9] On the issue of nullity, the appellants contend that the Relocation Decision is not subject to the 30-day time limit because, as being taken without appropriate procedural fairness, it was nul and void. The respondents have claimed that the appellants raised this only in passing before the Judge. During oral arguments before our Court, counsel for the appellants confirmed that only one paragraph of their written representations before the Judge made reference to this argument. It seems that the nullity argument was accordingly not emphasized before the Judge as it is before our Court.

[10] Nevertheless, even if it was clear that the appellants had made a nullity argument before the Judge, I am not convinced that they would have succeeded. Insofar as they wished to challenge the Relocation Decision dated March 7, 2016 on the basis that it was a nullity, they were still required to convince the Judge to extend the 30-day time limit imposed by the *Federal Courts Act*. The nullity argument would have been considered as part of the Judge's summary analysis of the merits under the *Larkman* test. In any event, the Judge sided with the appellants

as to the merit factor in the *Larkman* test. As for the appellants' challenge of eventual decisions by the Superintendent to issue a development permit or a building permit pursuant to the Community Plan, the nullity argument was simply premature.

[11] I am also of the view that the Judge followed the test outlined by this Court in *Larkman* for considering a motion for an extension of time and made no palpable and overriding error in applying it. He properly confined his analysis to the four *Larkman* factors. He was also careful not to conduct an in-depth analysis of the merits of the appellants' application. In fact, the error would have been to do so in the context of a motion. I note in passing that, as part of their oral submissions before this Court, the appellants often addressed the merits of their underlying judicial review application, yet this appeal is concerned only with the Judge's disposal of the two motions.

[12] Finally, having denied the appellants' motion for additional time, the Judge addressed the respondents' motion with respect to striking the appellants' applications for prohibition, declaration and injunction in their judicial review application. He found that the arguments raised by the appellants to challenge subsequent decisions that could be made by the Superintendent in the future (the eventual decisions referred to above at paragraph 4) focused on the alleged shortcomings in the Relocation Decision and, therefore, were "fatally undermined" once that decision was no longer in issue (Judges' reasons at para. 32). On this basis, the Judge granted the respondents' motion. While I agree with the Judge's disposition of the respondents' motion, I am of the view that the correct ground for granting it is that the appellants were seeking the relief of prohibition, declaration and injunction prematurely.

[13] On this last point, the appellants have expressed concern before our Court that the Judge's conclusion at paragraph 32 could be understood as foreclosing any future applications. I do not read that paragraph as imposing such a drastic outcome. To the contrary, I am of the view that paragraph 32 does not preclude requests for relief in the event that another administrative decision is rendered by the Superintendent.

IV. Conclusion

[14] For these reasons, I would dismiss the appeal with costs.

"Richard Boivin"
J.A.

"I agree
Wyman W. Webb J.A."

"I agree
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-72-17
STYLE OF CAUSE:	FRASER LEISHMAN and GRAY GREENWAY v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA, as represented by THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE and PARKS CANADA AGENCY
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	OCTOBER 3, 2017
REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	WEBB J.A. RENNIE J.A.
DATED:	OCTOBER 12, 2017

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