Federal Court of Appeal | Cour d'appel fédérale

Date: 20180530

Docket: A-219-16

Citation: 2018 FCA 102

Present: **STRATAS J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

OSHKOSH DEFENSE CANADA INC. and MACK DEFENSE LLC

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 30, 2018.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The Canadian International Trade Tribunal held that certain procurement complaints launched by Oshkosh Defense Canada against Public Works and Government Services Canada were partly valid. Later, the Tribunal recommended that the Crown pay Oshkosh $25,337,931.79 as compensation and $153,120 in costs.

[2] Before the Court are two judicial reviews of the Tribunal's decision, one by Oshkosh (file A-44-18) and one by the Attorney General (file A-219-16). The parties agree that the former should be stayed pending determination of the latter.

[3] Oshkosh submits that Public Works must now carry out the Tribunal's decision by complying with the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.). Specifically, Oshkosh wants Public Works to make the payments recommended by the Tribunal. It brings a motion in file A-44-18 seeking a direction to that effect.

[4] In response, the Attorney General moves for an order in file A-219-16 staying the Tribunal's decision until this Court decides its judicial review. The Attorney General also asks for an order permitting it to file a further affidavit in support of its judicial review.

[5] These are the Court's reasons on the parties' motions. A copy of these reasons shall be placed in this file and in file A-44-18.

A. The legislative framework

[6] Subsection 30.18(1) of the *Canadian International Trade Tribunal Act* provides that where the Tribunal makes recommendations under the Act, the affected government institution, here Public Works, shall, subject to the regulations, implement the recommendations to the greatest extent possible. As well, under subsection 30.18(2) of the Act, the government institution must advise the Tribunal in writing, within the prescribed period, of the extent to

which it intends to implement the recommendations and, if it does not intend to implement them fully, the reasons for not doing so. The prescribed period is currently 20 days: *Canadian International Trade Tribunal Procurement Inquiry Regulations*, SOR/93-602, para. 13(*a*). Where the government institution has advised the Tribunal that it intends to implement the recommendations in whole or in part, it has 60 days to advise the Tribunal of the extent to which it has implemented the recommendations: *Regulations*, para. 13(*b*). Oshkosh submits that Public Works has failed to follow these provisions.

[7] Neither the *Canadian International Trade Tribunal Act* nor the *Federal Courts Rules* provide for an automatic stay of the operation of these provisions or the Tribunal's recommendation. Thus, it is no surprise that this Court has made it clear that a party in the position of Public Works and Government Services Canada must either comply with these provisions or seek a stay of the Tribunal's recommendation: *Canada (Attorney General) v. Northrop Grumman Overseas Services Corporation*, 2007 FCA 336, 370 N.R. 239 at para. 20; *Canada (Attorney General) v. Symtron Systems Inc.*, [1999] 2 F.C. 514, 236 N.R. 143 (C.A.) at paras. 12-13. Ignoring the provisions of the Act and the Tribunal's recommendations is not an option.

B. Oshkosh's motion for a direction that Public Works carry out the Tribunal's recommendations

[8] In support of this motion, Oshkosh submits that Public Works has "simply ignor[ed] the [Tribunal's] recommendations": written submissions at para. 24.

[9] This submission ignores the evidence. The Tribunal wrote Public Works asking whether it intended to implement the Tribunal's recommendations. Public Works has replied that it will fully implement the Tribunal's recommendations subject to the determination of the applications for judicial review before this Court.

[10] One issue remains. Should Oshkosh receive the recommended compensation pending determination of the applications for judicial review? Oshkosh says it should. On this, the Attorney General seems to have made a key concession here. In its reply representations on the motion at para. 5, it states the following:

> Under the circumstances, whether [Public Works] is required to pay the recommended compensation prior to the outcome of the outstanding applications for judicial review…should depend on the outcome of the Attorney General's motion…seeking a stay of the [Tribunal's] recommendation with respect to the quantum of compensation representing Oshkosh's lost opportunity to profit.

(Attorney General's reply, at para. 5.)

[11] In light of the Attorney General's concession, if Attorney General is unsuccessful in obtaining a stay, I shall grant Oshkosh's motion.

[12] I make no comment on whether in future cases a government institution can comply with the above-mentioned provisions of the Act but unilaterally decline to implement a recommendation until after an application for judicial review is determined. I also make no comment on the situation where the government institution declines to implement a

recommendation, the judicial review is dismissed and it turns out that from the beginning the government institution should have implemented the recommendation.

C. The Attorney General's stay motion

(1) The nature and effect of the decisions of administrative decision-makers

[13] It is trite law that a decision of an administrative decision-maker takes effect upon pronouncement according to its terms. The only exceptions to this are a legislative provision that provides otherwise, a decision by the administrative decision-maker concerning the effective date of its decision, or an order of a reviewing court staying the decision pending judicial review.

(2) The consequences: the alternative relief that should be sought from administrative decision-makers

[14] Because of this, those defending administrative proceedings often ask the administrative decision-maker to exercise its discretion to delay the effective date of any adverse decision in order to facilitate a judicial review. Defendants advance this often as an alternative or secondary position behind their primary position that the administrative proceedings should be dismissed outright. Care must be taken to advance it before the administrator has rendered its decision and become *functus*: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, 62 D.L.R. (4th) 577.

[15] Most administrative decision-makers have the explicit or implicit ability under their empowering statutes to exercise their discretion to delay the effective date of an adverse decision. On this, many have set out tests governing the exercise of their discretion in their jurisprudence or in policy statements.

(3) The appropriate posture of the review court in the face of an administrator's decision concerning the effective date of its decision

[16] When an administrator exercises its discretion to delay or not to delay the effective date of its decision—usually a fact-based discretion—the reviewing court is reluctant to turn around and interfere by staying the administrator's decision. Such exercises of discretion are normally entitled to deference and the Court's power to stay cannot be exercised in a manner that too readily countermands what the Tribunal has considered appropriate on the facts.

[17] This being said, a stay is possible provided that a somewhat demanding test is satisfied.

[18] There is nothing in the material before the Court to suggest that Public Works asked the Tribunal to delay the effective date of its decision. As will be seen, the failure to ask the Tribunal to delay the effective date of its decision can affect the reviewing court's discretion to stay the decision of the Tribunal.

(4) The power of a reviewing court to stay the administrator's decision pending judicial review

[19] In this case, the Attorney General moves for a stay of the Tribunal's recommendations in circumstances where the Tribunal has not been asked to delay the effective date of its decision.

[20] This Court has the power to issue stays under section 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Rule 398 of the *Federal Courts Rules* provides an alternative basis for the granting of a stay in the case of appeals, including statutory appeals from administrative decisions.

[21] Where a court reviewing an administrative decision is asked to stay the decision pending judicial review, a well-known test applies: *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385. The moving party must demonstrate that the judicial review has a serious issue to be tried, the moving party will suffer irreparable harm, and the balance of convenience lies in its favour. It must satisfy all these requirements: *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 112, 120 C.P.R. (4th) 385 at paras. 13-14.

[22] Perhaps the toughest obstacle for a party seeking a stay is the requirement to prove the existence of irreparable harm.

[23] The moving party's failure to ask the administrative decision-maker to delay the effect of its decision may be relevant to the reviewing court's consideration of a motion to stay the administrative decision and, in particular, the presence of irreparable harm. It may call for some

explanation. Without explanation, the failure might be taken as an indication that the moving party did not think that the harm that would eventuate from an adverse award would matter: Robert J. Sharpe, *Injunctions and Specific Performance* (looseleaf) Toronto: Thomson Reuters, 2017 (looseleaf updated November 2017) at §1.990; *e.g.*, *Cardinal v. Cleveland Indians Baseball Company Limited Partnership*, 2016 ONSC 6929, 134 O.R. (3d) 6929 at paras. 69-73.

[24] Further, irreparable harm is unavoidable harm that, by its quality, cannot be redressed by monetary compensation: *Janssen Inc.*, above at para. 24. Without explanation, a failure to ask the administrative decision-maker to delay the effect of its decision might be taken to be the failure to avail oneself of an opportunity to avoid the harm stemming from an adverse decision.

[25] Finally, to prove irreparable harm, the moving party must demonstrate in a detailed and concrete way that it will suffer real, definite, unavoidable harm—not hypothetical and speculative harm—that cannot be repaired later: *Stoney First Nation v. Shotclose*, 2011 FCA 232, 422 N.R. 191 at paras. 47-49; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84, 402 N.R. 341 at paras. 14-22; *Gateway City Church v. Canada (National Revenue)*, 2013 FCA 126, 445 N.R. 360 at paras. 14-16; *Glooscap Heritage Society v. Canada(National Revenue)*, 2012 FCA 255, 440 N.R. 232 at para. 31; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 at para. 12; *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 176 at paras. 44-46. Those who offer assertions rather than evidentiary demonstrations and "[a]ssumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence" often fall short on this branch of the stay test: *Glooscap* at para. 31; *Stoney First Nation* at para. 48. Those who offer "evidence at a convincing level of particularity that demonstrates a real

probability that unavoidable irreparable harm will result unless a stay is granted" often succeed: *Glooscap* at para. 31; see also *Dywidag Systems International, Canada, Ltd. v. Garford Pty Ltd*., 2010 FCA 232, 406 N.R. 304 at para. 14 and *Laperrière* at para. 17.

(5) The application of these principles to the Attorney General's motion for a stay

[26] The Attorney General's motion for a stay ultimately fails for want of adequate proof of irreparable harm.

[27] The only facts the Attorney General offers on irreparable harm appear in a single sentence in para. 35 of the affidavit proffered by the Attorney General: "The Respondent Oshkosh describes itself as a subsidiary of Oshkosh Corporation, a United States Corporation."

[28] By itself, this is not evidence of irreparable harm. It is not evidence that any monies paid to Oshkosh will be sent to its parent company in the United States. Further, it is not evidence that if that were to happen and if the Attorney General were to succeed in her judicial review, the parent company in the United States would be unwilling or unable to return the monies to Oshkosh.

[29] Oshkosh has filed evidence suggesting there is no likelihood of irreparable harm. Its parent company has substantial assets. The Oshkosh group of companies are in the multi-billion dollar business of selling to governments around the world and it is "preposterous" to think that it would risk its international reputation by arbitrarily keeping monies belonging to the

Government of Canada. For good measure, Oshkosh's parent has provided an undertaking that if it receives the monies it will return them if the Tribunal's decision is set aside.

[30] In her written submissions, the Attorney General submits that if she is successful in her application for judicial review, "a substantial amount of taxpayer funds will have been paid to Oshkosh and the Crown may not be able to recover these funds." Even if I took this submission as evidence—which I cannot—it is speculative and abstract. The burden on a moving party seeking a stay is to adduce specific, particularized evidence establishing a likelihood of irreparable harm.

[31] I note that if Oshkosh were to receive funds under the Tribunal's decision and convey them beyond the jurisdiction knowing that in a mere matter of months it might have to return them, civil and criminal remedies may exist to redress the situation. The law of creditor-debtor has some teeth. Civil actions may also be available, including, in this case, an action based on the undertaking the parent company has given. True, it will be somewhat inconvenient for the Attorney General if she is driven to these remedies, but that is partly the consequence of her failure to ask the Tribunal to delay the effective date of its decision pending judicial review. This failure, incidentally, tends to support the idea that the Attorney General herself did not consider the harm that might eventuate to matter: there was no need to get protection against the immediate effect of the Tribunal's decision.

[32] In her written submissions, the Attorney General also submits that if the Crown pays Oshkosh the amount awarded by the Tribunal and if the Attorney General is successful in her

application for judicial review, this Court will not able to order Oshkosh to reimburse the Crown. The Attorney General cites the powers of this Court under subsection 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Under that subsection, this Court does not have the power to award damages.

[33] It is true that damages for negligent decision-making by an administrator cannot be sought in a judicial review: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 at para. 26; *Al-Mhamad v. Canada (Radio-Television and Telecommunications Commission)*, 2003 FCA 45, 120 A.C.W.S. (3d) 351; *Paradis Honey Ltd. v. Canada*, 2015 FCA 89, [2016] 1 F.C.R. 446 at para. 151; *Lessard-Gauvin v. Canada (Attorney General)*, 2016 FCA 172 at para. 8. Damages can only be sought by way of action. This is subject to a very limited and unusual exception: see *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215, [2009] 1 F.C.R. 476 at paragraphs 45-50 and the discussion of this in *Paradis Honey* at para. 151.

[34] But some judicial review remedies in subsection 18(3) may have the direct effect of requiring that monies be paid. An example is the *mandamus* remedy in *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167.

[35] Further, the quashing of certain administrative decisions may also require that monies paid under the decisions be returned. There is nothing wrong with including that requirement as a term in the judgment. Take, for example, an administrator's decision that a person must pay a public authority a certain amount. The person pays the amount and later brings an application for

judicial review to quash the decision that required the person to pay. The reviewing court finds for the person and quashes the decision. Surely the reviewing court can include in its judgment a term requiring a refund of the monies to the person. That term merely describes the inexorable consequence of quashing the decision, helpfully removes any doubt on the matter, and prevents a recalcitrant loser on judicial review from wrongly refusing to refund the monies.

[36] The authority for this is paragraph 18.1(3)(*b*) of the *Federal Courts Act* and the Court's powers as a court of equity. Under paragraph 18.1(3)(*b*), this Court can "declare invalid or unlawful, or quash, set aside or set aside and refer back for determination" a matter. It can add "such directions as it considers to be appropriate." Section 4 of the *Federal Courts Act* provides that this Court is a "court of…equity" under section 4 of the *Federal Courts Act* and relief under paragraph 18.1(3)(*b*) harkens back to the equitable "writ of certiorari": *Federal Courts Act*, subsection 18(1).

[37] The Federal Courts regularly attach terms to judgments that quash administrative decisions. I see no reason why they cannot attach terms requiring that any actions taken, such as the payment of monies under an administrative decision, be reversed. After all, it is equitable that if an administrative decision is quashed, the parties are placed in the position they were in before the quashed decision was made. See generally D. Stratas, *The Canadian Law of Judicial Review: Some Doctrine and Cases* (March 26, 2018) (online: https://ssrn.com/abstract=2924049) at pp. 111-112.

[38] True, if the respondent to a judicial review has diverted the monies it has received under the administrative decision to a third party, it may be unable to comply with the reviewing court's term that it return the monies to the applicant. The applicant still has access to the law of creditor-debtor or a civil action to get relief. But because of the term requiring the return of the monies to the applicant, the applicant has one additional, convenient tool: the enforcement provisions of the *Federal Courts Rules*.

[39] Therefore, for the foregoing reasons, the motion to stay the Tribunal's decision shall be dismissed. As mentioned above, in this case the Attorney General has conceded that if it is not entitled to a stay, it will pay the compensation recommended by the Tribunal. Therefore, I shall make the direction sought by Oshkosh.

D. The motion to file an additional affidavit

[40] The Attorney General seeks leave to file an additional affidavit in support of its application for judicial review under Rule 312.

[41] At the outset, as a motions judge, I must decide whether to decide the motion myself or adjourn it for the consideration of the panel hearing the judicial review. The principles governing the exercise of discretion are as follows:

> When to determine a motion is a matter of discretion: *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297 at paragraph 11. The discretion is guided by Rule 3 of the *Federal Courts Rules*, SOR/98-106: the need to "secure the just,

> most expeditious and least expensive determination of every proceeding on its merits." In applications for judicial reviews, the commandment in subsection 18.4(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7—that they be "heard and determined without delay and in a summary way"—may also bear upon the discretion.
>
> This Court usually determines motions on the basis of written material filed by the parties: Rule 369. However, where there are certain ambiguities or complexities or where otherwise appropriate, this Court can request oral submissions. In these circumstances, judicial economy may favour leaving the motion to the appeal panel, unless for some reason time is of the essence or other considerations favour immediate determination.
>
> Where the motion is clear-cut or obvious, it might as well be decided right away. Efficiency and judicial economy support this: *Collins v. Canada*, 2014 FCA 240, 466 N.R. 127 at paragraph 6; *Canadian Tire Corp. Ltd. v. P.S. Partsource Inc*., 2001 FCA 8, 267 N.R. 135. However, if reasonable minds might differ on the outcome of the motion, the ruling should be left to the panel hearing the appeal: *McKesson Canada Corporation v. Canada*, 2014 FCA 290, 466 N.R. 185 at paragraph 9; *Gitxaala Nation v. Canada*, 2015 FCA 27 at paragraph 7. Sometimes the novelty, quality or incompleteness of the submissions may make it sensible to leave the motion for the appeal panel to determine: *Gitxaala Nation*, above at paragraphs 9-12.

(*Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 196, 487 N.R. 196 at paras. 8-10.)

[42] In this case, I consider the issues raised by this motion to be clear-cut and straight-forward. It need not be left for the panel hearing the application for judicial review.

[43] This Court set out the test for admitting an additional affidavit under Rule 312 in *Forest Ethics Advocacy Association v. National Energy Board*, 2014 FCA 88 at paras. 4-6:

> …[T]o obtain an order under Rule 312 the applicants must satisfy two preliminary requirements:

> (1) The evidence must be admissible on the application for judicial review. As is well known, normally the record before the reviewing court consists of the material that was before the decision-maker. There are exceptions to this. See *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 at pages 144-45 (C.A.); *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22.
>
> (2) The evidence must be relevant to an issue that is properly before the reviewing court. For example, certain issues may not be able to be raised for the first time on judicial review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654.
>
> Assuming the applicants establish these two preliminary requirements, they must convince the Court that it should exercise its discretion in favour of granting the order under Rule 312. The Court exercises its discretion on the basis of the evidence before it and proper principles.
>
> In *Holy Alpha and Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 101 at paragraph 2, this Court set out the principles that guide its discretion under Rule 312. It set out certain questions relevant to whether the granting of an order under Rule 312 is in the interests of justice:
>
> (a) Was the evidence sought to be adduced available when the party filed its affidavits under Rule 306 or 308, as the case may be, or could it have been available with the exercise of due diligence?
>
> (b) Will the evidence assist the Court, in the sense that it is relevant to an issue to be determined and sufficiently probative that it could affect the result?
>
> (c) Will the evidence cause substantial or serious prejudice to the other party?

[44] The Attorney General submits that the affidavit is admissible in support of an issue of procedural fairness. It is not admissible on that basis. Other than general paragraphs (paras. 10 and 18) that give general background about the proceeding before the Tribunal, information that is already before the Court, the affidavit does not address the process the Tribunal followed or

failed to follow that gives rise to a procedural fairness concern pleaded in the notice of application.

[45] Rather, the affidavit sought to be added speaks to the substantive merits of an issue before the Tribunal: the merits of the Tribunal's determination regarding the Speed on Grade tests and the settings that were used during the vehicle testing. This evidence should have been placed before the Tribunal so that the Tribunal, as the fact-finder and merits decider, could evaluate it. Normally, it is impermissible to bootstrap a case on the merits by adducing new evidence before the reviewing court. The reviewing court is not the merits-decider. Subject to limited exceptions, it only reviews what the administrative decision-maker has done on the merits. See generally *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297 at para. 19.

[46] I also note that the Tribunal struck substantially the same affidavit during its hearing. As well, even if the affidavit were admissible, it could have been adduced earlier under Rule 306 with the exercise of reasonable diligence. Further, I substantially agree with the submissions of Oshkosh at paras. 44-64 of its responding written representations.

[47] For the foregoing reasons, I shall dismiss the Attorney General's motion for leave to file an additional affidavit.

E. Disposition of the motions

[48] An order shall issue in accordance with these reasons. The parties agree on certain other matters such as the nature of the record to be filed in this Court, the staying of file A-44-18 pending the determination of file A-219-16, and the scheduling of file A-219-16. The order shall also deal with all these matters and shall be placed in both court files.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-219-16
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. OSHKOSH DEFENSE CANADA INC. AND MACK DEFENSE LLC

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	MAY 30, 2018

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