Federal Court of Appeal | Cour d'appel fédérale

Date: 20180629

Docket: A-147-18

Citation: 2018 FCA 130

CORAM: **WEBB J.A.**
NEAR J.A.
LASKIN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

HARRIS CORPORATION

Respondent

Heard at Toronto, Ontario, on June 28, 2018.

Judgment delivered at Ottawa, Ontario, on June 29, 2018.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: NEAR J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This application arises in relation to a pending complaint inquiry before the Canadian International Trade Tribunal (the CITT). Harris Corporation filed a complaint in relation to the procurement process for certain night-vision binoculars. Public Works and Government Services Canada (PWGSC) has taken the position that the procurement is subject to a National Security Exception (NSE) and, therefore, the CITT does not have the jurisdiction to deal with the merits

of the complaint. The Attorney General of Canada, as set out in paragraph 1 of the Amended Notice of Application, has brought this application for:

> (a) an Order issuing a writ of prohibition, prohibiting the [CITT] from continuing its inquiry into Complaint Number PR-2018-001;
>
> (b) an Order issuing a writ of certiorari quashing the [CITT]'s interim directions of April 12, 2018, April 20, 2018 and April 27, 2018;
>
> (c) an Order granting a declaration that the invocation of the [NSE] removed any jurisdiction of the [CITT] over the Complaint;
>
> (d) an Order granting an interim and interlocutory stay of proceedings before the [CITT] in Complaint Number PR-2018-001, pending the disposition of this Application;
>
> (e) an Order expediting the hearing of this Application;
>
> (f) the costs of the Application, plus all applicable taxes; and
>
> (g) such further and other relief as this Honourable Court may deem just.

I. Background

[2] Harris Corporation filed a complaint with the CITT on April 10, 2018 in relation to the procurement by PWGSC of certain night-vision binoculars. On April 12, 2018 the CITT sent a letter to PWGSC notifying PWGSC that the CITT was commencing an inquiry into the complaint filed by Harris Corporation and notifying PWGSC of its obligations to file certain documents. The letter also indicated that:

> The complaint also raises issues of the scope of confidentiality, the application of the trade agreements to the procured goods, whether the complainant is a Canadian supplier and the operation of the [NSE]s of the trade agreements. Therefore, the [CITT] requests that PWGSC:

> 1. Indicate to the [CITT] by no later than **Tuesday April 17, 2018**, whether it objects to the public release of any documents or information in the public version of Harris's complaint and attachments, or to the form and content of the [CITT]'s draft *Canada Gazette* Notice of Inquiry (attached); and
>
> 2. File its response to the complaint's motion for disclosure as well as any other preliminary motions on the above or any other topics it wishes to raise, by no later than **Noon on Thursday April 19, 2018**.
>
> (underlying added, the other emphasis is in the original)

[3] PWGSC requested and was granted an extension of time to May 3, 2018 to file any preliminary motion. By letter dated April 26, 2018, it confirmed that it would be filing with the CITT "a Motion seeking an Order that the Tribunal will cease its inquiry on the basis that the NSE has been invoked with respect to the solicitation at issue". By letter dated April 27, 2018 from the CITT, the deadline for filing "any preliminary (including jurisdictional) motions" was extended to May 18, 2018. However, the CITT noted that it could not comply with the request of PWGSC to bifurcate the jurisdictional issue and address it first before continuing with the inquiry given the statutory mandate to complete the inquiry process within a maximum (after granting the extensions permitted) of 135 days of the filing of the complaint as provided in section 12 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, SOR/93-602.

[4] Instead of filing a motion with the CITT challenging the right of CITT to continue with the inquiry, the Attorney General brought this application.

[5] The Attorney General included in the document entitled “Application Record” four letters that she submitted established that the NSE had been properly invoked. However, these letters were submitted without an accompanying affidavit. These documents were not properly before this Court and, therefore, will not be considered in relation to this application.

[6] The Attorney General acknowledged during the hearing that the reason that this application was brought was that the CITT refused to suspend the complaint process until the preliminary “jurisdictional” issue was resolved. Therefore, the Attorney General is acknowledging that the CITT could address the issue of whether it had the right to continue the inquiry, but is essentially objecting to the refusal of the CITT to bifurcate the issue of whether the inquiry can continue if an NSE is invoked.

[7] In *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61, [2011] 2 F.C.R. 332 (*C.B. Powell*), this Court confirmed that, barring exceptional circumstances, a person must complete the administrative process for resolving disputes before that party can seek the intervention of the court. This would also apply even if the issue is a so-called “jurisdictional” issue. This Court in *C.B. Powell* noted that:

> 45 It is not surprising, then, that courts all across Canada have repeatedly eschewed interference with intermediate or interlocutory administrative rulings and have forbidden interlocutory forays to court, even where the decision appears to be a so-called "jurisdictional" issue: see e.g., *Matsqui Indian Band*, above; *Greater Moncton International Airport Authority*, above, at paragraph 1; *Air Canada v. Lorenz*, [2000] 1 F.C. 94 (T.D.), at paragraphs 12 and 13; *Delmas*, above; *Myers v. Law Society of Newfoundland* (1998), 165 Nfld. & P.E.I.R. 150 (Nfld. C.A.); *Canadian National Railway Co. et al. v. Winnipeg City Assessor* (1998), 131 Man. R. (2d) 310 (C.A.); *Dowd v. New Brunswick Dental Society* (1999), 210 N.B.R. (2d) 386 (C.A.).

> 46 I conclude, then, that applying the "jurisdictional" label to the ruling of the President of the CBSA under subsection 60(1) of the Act in this case changes nothing. In particular, applying the "jurisdictional" label to the President's ruling did not permit C.B. Powell to proceed to Federal Court, bypassing the remainder of the administrative process, namely the appeal to the C.I.T.T. under subsection 67(1) of the Act.

[8] In *Halifax Regional Municipality v. Nova Scotia Human Rights Commission, et al.*, 2012 SCC 10, [2012] 1 S.C.R. 364 (*Halifax*), the Supreme Court of Canada also confirmed that courts should be reluctant to intervene at an early stage of an administrative process. The administrative body should first be given the opportunity to rule on the particular question and provide its reasoning before a party applies for judicial review. Otherwise there are no reasons for a Court to review.

[9] In *Halifax* the Supreme Court of Canada concluded that its earlier decision in *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756 (*Bell* (1971)) should no longer be followed. In particular, the Supreme Court of Canada stated that:

> 35 The second aspect of *Bell* (1971) is its approach to judicial intervention on grounds which have not been considered by the tribunal or before an administrative process has run its course. Since *Bell* (1971), courts, while recognizing that they have a discretion to intervene, have shown restraint in doing so: see, e.g. the authorities reviewed in *C.B. Powell*, at paras. 30-33; *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181, at p. 235; *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada)*, [1997] 3 S.C.R. 440, at paras. 60 and 72; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 51; *Violette v. New Brunswick Dental Society*, 2004 NBCA 1, 267 N.B.R. (2d) 205, at para. 14; and *Air Canada v. Lorenz*, [2000] 1 F.C. 494 (T.D.), at paras. 13-15.
>
> 36 While such intervention may sometimes be appropriate, there are sound practical and theoretical reasons for restraint: D.J. Mullan, *Administrative Law* (3rd ed. 1996), at s.540; P. Lemieux, *Droit Administratif : Doctrine et jurisprudence* (5th ed. 2011), at pp. 371-72. Early judicial intervention risks depriving the reviewing court of a full record bearing on the issue; allows for

> judicial imposition of a "correctness" standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regimes: see, e.g., *Szczecka v. Canada (Minister of Employment and Immigration)* (1993), 170 N.R. 58 (F.C.A.), at paras. 3-4; *Zündel* (1999), at para. 45; *Psychologist Y v. Board of Examiners in Psychology*, 2005 NSCA 116, 236 N.S.R. (2d) 273, at paras. 23-25; *Potter v. Nova Scotia Securities Commission*, 2006 NSCA 45, 246 N.S.R. (2d) 1, at paras. 16 and 36-37; *Vancouver (City) v. British Columbia (Assessment Appeal Board)* (1996), 135 D.L.R. (4th) 48 (B.C.C.A.), at paras. 26-27; *Mondesir v. Manitoba Assn. of Optometrists* (1998), 163 D.L.R. (4th) 703 (Man. C.A.), at paras. 34-36; *U.F.C.W., Local 1400 v. Wal-Mart Canada Corp.*, 2010 SKCA 89, 321 D.L.R. (4th) 397, at paras. 20-23; Mullan (2001), at p. 58; Brown and Evans, at paras. 1:2240, 3:4100 and 3:4400. Thus, reviewing courts now show more restraint in short-circuiting the decision-making role of the tribunal, particularly when asked to review a preliminary screening decision such as that at issue in *Bell* (1971).
>
> 37 Moreover, contemporary administrative law accords more value to the considered opinion of the tribunal on legal questions, whether the tribunal's ruling is ultimately reviewable in the courts for correctness or reasonableness: *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 89; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 25; *C.B. Powell*, at para. 32; and Brown and Evans, at para. 3:4400.
>
> 38 For these reasons, *Bell* (1971) should no longer be followed in relation to its approach to preliminary jurisdictional questions or when judicial intervention is justified in an ongoing administrative process.

[10] In this case the CITT, by accepting the complaint for inquiry, was performing a screening function and was not necessarily ruling on the question of whether any invocation of the NSE would result in the CITT not being able to address the complaint on its merits. The Attorney General should first have brought her motion before the CITT or otherwise made her submissions on this question to the CITT and received a ruling from the CITT on this question. Without a decision of the CITT on whether the inquiry can continue, we do not have any reasons to review. The refusal of the CITT to bifurcate this issue from the merits of the complaint is not an exceptional circumstance that warrants the intervention of this Court. Failing to allow the

CITT to first rule on this question is, in the circumstances of this case, fatal to this application. The application for a writ of prohibition should be dismissed.

[11] In paragraph 97 of her memorandum the Attorney General stated that "in order to comply with the Third Interim Order, PWGSC must file its GIR [Government Institution Report] and its response to the Motion for Disclosure, both of which will contain information relating to national security interests…". However, as noted during the hearing, the provisions of *Canada Evidence Act*, R.S.C. 1985, c. C-5, will apply if the information is sensitive information as defined in section 38 of that Act. The confidential information provisions of the *Canadian International Trade Tribunal Act* (R.S.C. 1985, c. 47 (4th Supp.)) may also be sufficient to address confidentiality issues.

[12] The Attorney General asked for a writ of certiorari quashing the [CITT]'s interim direction of April 12, 2018. However, the Attorney General did not make any application to judicially review this decision and the time to do so expired before this application was brought. There is no basis to grant this writ.

[13] I would also not quash the other decisions of the CITT as these were simply procedural matters that set deadlines for the completion of certain steps.

[14] With respect to the declaration that was sought "that the invocation of the [NSE] removed any jurisdiction of the [CITT] over the Complaint", since this issue should be addressed by the CITT before this Court is asked to intervene, it is not appropriate to issue this declaration.

[15] The only stay requested by the Attorney General in her Amended Notice of Application was a stay “pending the disposition of this Application” and since this application is now resolved, no stay is necessary.

[16] During the hearing of this application, the Attorney General asked for a stay of the Complaint before the CITT until the CITT ruled on the question of whether it could continue with the Complaint. This, however, is not a remedy that the Attorney General was seeking in her Amended Notice of Application and, in any event, the CITT should be allowed to determine its own procedure.

[17] As a result, I would dismiss this application, with costs.

"Wyman W. Webb"
J.A.

“I agree
D. G. Near J.A.”

“I agree
J.B. Laskin J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

THE APPLICATION FOR AN ORDER ISSUING A WRIT OF PROHIBITION AND CERTAIN OTHER ORDERS.

DOCKET:	A-147-18
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. HARRIS CORPORATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 28, 2018
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	NEAR J.A. LASKIN J.A.
DATED:	JUNE 29, 2018

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