Date: 20070924

Docket: A-301-07
A-302-07

Citation: 2007 FCA 304

CORAM: **DÉCARY J.A.**
LÉTOURNEAU J.A.
SHARLOW J.A.

BETWEEN:

CITY CENTRE AVIATION LTD., REGCO HOLDINGS INC., PORTER AIRLINES INC. and ROBERT J. DELUCE

Appellants (A-301-07)
Respondents/Intervenors (A-302-07)

and

JAZZ AIR LP

Respondent (A-301-07)
Respondent (A-302-07)

and

TORONTO PORT AUTHORITY

Respondent (A-301-07)
Appellant (A-302-07)

Heard at Ottawa, Ontario, on September 24, 2007.

Judgment delivered from the Bench at Ottawa, Ontario, on September 24, 2007.

REASONS FOR JUDGMENT OF THE COURT BY: SHARLOW J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on September 24, 2007)

SHARLOW J.A.

[1] These appeals arise from an application by Jazz Air LP for judicial review of the decision of the Toronto Port Authority to deny Jazz Air LP access to the facilities of the Toronto City Centre Airport (T-1427-06). That application was filed on August 8, 2006. It was the second such application by Jazz Air LP. The first application (T-431-06) was filed on March 9, 2006 but

discontinued on August 8, 2006, after Justice Rouleau upheld an order by Prothonotary Milczynski converting the application to an action.

[2] On February 1, 2007, Prothonotary Milczynski granted the motion of City Centre Aviation Ltd., Regco Holdings Inc., Porter Airlines Inc. and Robert J. Deluce (collectively, "Porter Airlines") and the Toronto Port Authority to strike the second application of Jazz Air LP as an abuse of process (2007 FC 114). Jazz Air LP appealed that order under Rule 51 of the *Federal Courts Rules*. On June 12, 2007, Justice Hugessen allowed the appeal, set aside the prothonotary's order, and substituted an order allowing the application to proceed as an action subject to certain conditions (2007 FC 624).

[3] Justice Hugessen agreed with the prothonotary that the actions of Jazz Air LP were purely tactical and were designed to circumvent the order converting the first application to an action, but he considered her remedy to go too far. His order is intended to frustrate what he called the "misguided strategy" of Jazz Air LP without denying them their day in court.

[4] Porter Airlines and the TPA have appealed the order of Justice Hugessen on the basis that he erred in law in reversing the prothonotary's order. The two appeals raise substantially the same issue and were consolidated. The appellants argue that, because Justice Hugessen found no error of law or fact on the part of the prothonotary, he had no grounds for interfering with her order.

[5] The seminal case on the standard of review of a discretionary decision of a Federal Court prothonotary is *Canada v. Aqua-Gem Investments Ltd. (C.A.)*, [1993] 2 F.C. 425, in which the standard of review of a discretionary order of a prothonotary was described as follows by Justice MacGuigan, writing for the majority at page 463.

> […] discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:
>
> (a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or
>
> (b) they raise questions vital to the final issue of the case.

[6] Chief Justice Isaac, in dissent, stated the test as follows (emphasis added):

> I am of the opinion that [discretionary orders of prothonotaries] ought to be disturbed on appeal only where it has been made to appear that
>
> (a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or
>
> (b) in making them, the prothonotary <u>improperly</u> exercised his discretion on a question vital to the final issue of the case.

[7] The only difference is that Chief Justice Isaac used the qualifier “improperly” in the “final issue” branch of the test. It is not clear why he did so. He and Justice MacGuigan both indicated that they were adopting by analogy the test for reviewing the discretionary decision of a local judge, as stated by the Ontario Court of Appeal in *Stoicevski v. Casement* (1983), 43 O.R. (2d) 436 (O.C.A.), which sets out substantially the test as stated by Justice MacGuigan for the majority in *Aqua-Gem.*

[8] Whatever the explanation for the difference in the wording between the test as stated in the majority and dissenting reasons in *Aqua-Gem*, this Court and the Federal Court are bound by the decision of the majority unless and until it is changed by a subsequent decision.

[9] The appellants argue that the test as stated by Justice MacGuigan for the majority in *Aqua-Gem* has been changed by *Z.I. Pompey Industries v. ECU-Line N.V.*, [2003] 1 S.C.R. 450. The standard of review of a discretionary decision of a prothonotary is addressed in paragraph 18 of the reasons, which reads as follows (emphasis added):

> Discretionary orders of prothonotaries ought to be disturbed by a motions judge only where (a) they are clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts, or (b) in making them, the prothonotary improperly exercised his discretion on a question vital to the final issue of the case: *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.), per MacGuigan J.A. at pp. 462-63.

[10] In stating this standard of review, the Supreme Court of Canada in *Z.I. Pompey* cited the majority decision in *Aqua-Gem* but quoted the dissenting reasons. We agree with Justice Hugessen that the Supreme Court of Canada did not intend to alter the standard of review stated by the majority in *Aqua-Gem*. The Supreme Court of Canada would not make such an important change to the jurisprudence of this Court and the Federal Court, particularly on an issue that was not relevant to the merits of the case before it, without saying it was doing so and explaining why.

[11] We conclude that, despite paragraph 18 of *Z.I. Pompey*, the Federal Court and this Court continue to be bound by the test as stated by Justice MacGuigan for the majority in *Aqua-Gem*.

[12] Further, despite the able submissions of counsel for the appellants relying *inter alia* on the new *Federal Courts Rules* enacted after *Aqua-Gem*, we are not persuaded that this Court should change the test.

[13] The test was recently restated by Justice Décary, on this point writing for the Court in *Merck & Co. v. Apotex Inc.*, 2003 FCA 488, at paragraph 19. The restated test reads as follows:

> Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:
>
> a) the questions raised in the motion are vital to the final issue of the case, or
>
> b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

The restatement simply reverses the two branches of the test so that they are considered in a more logical order. Once it is determined that a *de novo* review is required, it is not necessary to attempt to identify any error in the decision under appeal.

[14] In this case, the motion to dismiss the proceeding as an abuse of process raised questions vital to the final issue of the case. For that reason, Justice Hugessen was required to exercise his discretion *de novo*, which is what he did. The record discloses no error on the part of Justice Hugessen that warrants the intervention of this Court.

[15] These appeals will be dismissed with one set of costs.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-301-07 A-302-07
(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE HUGESSEN DATED JUNE 12, 2007, DOCKET NO. T-1427-06)	
STYLE OF CAUSE:	CITY CENTRE AVIATION LTD., REGCO HOLDINGS INC., PORTER AIRLINES INC., and ROBERT J. DELUCE Appellants (A-301-07) Respondents/Intervenors (A-302-07) and JAZZ AIR LP Respondent (A-301-07) Respondent (A-302-07) and TORONTO PORT AUTHORITY Respondent (A-301-07) Appellant (A-302-07)
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 24, 2007
REASONS FOR JUDGMENT OF THE COURT BY:	(Décary, Létourneau, Sharlow JJ.A.)
DELIVERED FROM THE BENCH BY:	Sharlow J.A.

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