Federal Court of Appeal | Cour d'appel fédérale

Date: 20210917

Docket: A-297-20

Citation: 2021 FCA 183

CORAM: **DE MONTIGNY J.A.**
RIVOALEN J.A.
LOCKE J.A.

BETWEEN:

VANCOUVER FRASER PORT AUTHORITY

Appellant

and

GCT CANADA LIMITED PARTNERSHIP and ATTORNEY GENERAL OF CANADA

Respondents

Heard by online video conference hosted by the Registry on September 10, 2021.

Judgment delivered at Ottawa, Ontario, on September 17, 2021.

REASONS FOR JUDGMENT BY: LOCKE J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

LOCKE J.A.

I. Background

[1] The appellant, Vancouver Fraser Port Authority (VFPA), is a port authority established under the *Canada Marine Act*, S.C. 1998, c. 10. Among its varied responsibilities is authorizing

the construction and operation of container terminals. The respondents are GCT Canada Limited Partnership (GCT) and the Attorney General of Canada, though the latter has not participated in this appeal. GCT is a tenant of VFPA, holding a permit therefrom to operate the terminal at Roberts Bank in Delta, British Columbia.

[2] On February 5, 2019, GCT submitted a Preliminary Project Enquiry (PPE) proposing a project to expand the Roberts Bank terminal. On March 1, 2019, VFPA advised GCT that it would not be processing the PPE in part because VFPA preferred a separate project for additional container capacity that it was already leading and pursuing. This is referred to hereinafter as the March 2019 decision.

[3] In response to the March 2019 decision, GCT commenced an application for judicial review before the Federal Court that same month, alleging, among other things, that VFPA had demonstrated actual bias in its decision-making. A few months later, VFPA purported to rescind the March 2019 decision in order to consider GCT's submissions on its proposed project. GCT responded that the purported rescission had no effect on its view as to VFPA's bias. GCT also rejected VFPA's subsequent invitation to make submissions to VFPA on the question of its own bias.

[4] The present appeal arises from a motion by VFPA to strike GCT's notice of application. That motion was allowed in part by Prothonotary Angela Furlanetto (as she then was) by Order dated March 9, 2020 (2020 FC 348), but the bias allegations were not struck. That decision was

maintained on appeal to Justice Michael Phelan by Order dated November 17, 2020 (2020 FC 1062). VFPA now appeals Justice Phelan's order.

[5] For the reasons provided below, I would dismiss the appeal.

II. The Decisions of the Federal Court

[6] Prothonotary Furlanetto noted the high threshold for striking a notice of application: it must be "so clearly improper as to be bereft of any chance of success" (*David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at 600 (C.A.), 58 C.P.R. (3d) 209).

[7] In support of its motion to strike, VFPA argued grounds of mootness, prematurity, and want of jurisdiction. Only prematurity remains in issue in the present appeal.

[8] VFPA's prematurity argument was based on the principle discussed in *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332 (*C.B. Powell*), and other decisions, that:

A. Generally speaking, "parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted" (para. 30);

B. "[A]bsent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course" (para. 31); and

C. "[V]ery few circumstances qualify as 'exceptional' and the threshold for exceptionality is high … Concerns about … bias … are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted" (para. 33).

[9] VFPA argued before Prothonotary Furlanetto that GCT's failure to put its bias allegations first to VFPA, especially after having been invited to do so, denied VFPA the opportunity to respond to those allegations, and left the Federal Court with nothing on the issue to review. VFPA argued that, without some comment by it on the question of its purported bias, judicial review was premature.

[10] Though she acknowledged the principle of exhaustion discussed in *C.B. Powell*, Prothonotary Furlanetto refused to strike the notice of application for prematurity. She noted that the validity of the purported rescission of the March 2019 decision is in dispute, and therefore VFPA could not rely on the rescission to argue that it had not made the decision that contains the alleged demonstration of actual bias. Prothonotary Furlanetto found that, in light of the circumstances, it was not clear what steps could be taken by VFPA to address the bias allegations. She also apparently left room for the possibility that VFPA purported to rescind the March 2019 decision in an effort to avoid scrutiny on the issue of its bias. She cited *Whalen v. Fort McMurray No. 468 First Nation*, 2019 FC 732, [2019] 4 F.C.R. 217 (*Whalen*) at para. 23, in support of her statement at para. 36 of her reasons that "a decision-making body cannot manipulate the prematurity doctrine to shield itself from judicial review simply by announcing that its decision is not definitive, or as in this case, that it has been rescinded." Prothonotary Furlanetto found that the facts in this case fall into the exceptional circumstances contemplated in *C.B. Powell*.

[11] On appeal to Justice Phelan, he agreed with Prothonotary Furlanetto. He noted that the prematurity argument arises from the alleged rescission of the March 2019 decision, and he agreed with Prothonotary Furlanetto's reliance on *Whalen* and the principle it stands for.

III. Analysis

[12] VFPA acknowledges that, pursuant to *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331, the standard of review that the Federal Court was to apply on appeal from the Prothonotary's order was as contemplated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: correctness on questions of law, and palpable and overriding error on questions of fact or of mixed fact and law in which there is no extricable issue of law. The same standard applies to this Court's review of Justice Phelan's order.

[13] VFPA argues that Justice Phelan erred in law by "failing to tackle the key issue on appeal; namely that as a matter of law, absent exceptional circumstances, GCT was required to raise its allegations of bias with the decision maker." I disagree that Justice Phelan failed to tackle this issue. Though he did not mention this principle explicitly, he did express agreement with Prothonotary Furlanetto on the point, and she explicitly discussed the principle. She found the exceptional circumstances required to overcome the principle. I am satisfied that Justice Phelan did tackle this issue.

[14] VFPA also argues that no exceptional circumstances existed. This is a question of mixed fact and law, which finding should not be disturbed without a palpable and overriding error. As indicated above, Prothonotary Furlanetto indicated clearly that she found exceptional circumstances in the allegation of bias in the March 2019 decision, and the allegation that VFPA attempted to avoid judicial scrutiny concerning bias by purporting to rescind the March 2019 decision. It is not the role of this Court in this appeal to agree or disagree with GCT's allegations, or even with Prothonotary Furlanetto's recognition of the allegations for the purposes of the motion to strike, but I see no palpable and overriding error in Justice Phelan's conclusion that Prothonotary Furlanetto did not err in this respect. Though this Court placed a high threshold for exceptional circumstances in *C.B. Powell*, it suggested that the restriction on bias being exceptional circumstances does not extend to situations in which the issue cannot be raised and effectively remedied within the administrative process. Because VFPA had already made the March 2019 decision (a decision which appeared to be final when it was made), and the rescission of that decision is in dispute, I am not convinced that the restriction against bias allegations as exceptional circumstances applied to the motion to strike.

[15] At the hearing of this appeal, VFPA advanced a new argument that was not included in its memorandum of fact and law, and which apparently was not made to Justice Phelan. This argument relies on the principle that allegations of bias must be raised at the earliest opportunity. A party cannot "stay still in the weeds" and then proceed to "pounce" with allegations of bias without allowing a proper record to be developed (*Taseko Mines Limited v. Canada (Environment)*, 2019 FCA 320 at para. 46, 32 C.E.L.R. (4th) 18; *Hennessey v. Canada*, 2016 FCA 180 at paras. 20-21, 484 N.R. 77). VFPA argues that GCT had been aware for some time

prior to submitting its PPE in February 2019 of VFPA's preferred alternative terminal expansion project that is the focus of the bias allegations, and that its concerns should have been communicated to VFPA earlier, and certainly no later than the filing of its PPE. VFPA argues that the notice of application for judicial review was not the "earliest opportunity" to raise the bias allegations.

[16] Firstly, this new argument is inappropriate because it was not raised in VFPA's memorandum of fact and law. More importantly, it lacks merit anyway. GCT's allegation is that VFPA demonstrated actual bias in the March 2019 decision. I am not convinced that it is beyond doubt that GCT's knowledge of VFPA's preference for another project would necessarily have indicated to GCT that VFPA would refuse to process GCT's competing project. In other words, GCT may have a reasonable argument that it raised its bias allegations at the earliest opportunity.

[17] VFPA's argument that GCT's application for judicial review is premature is more appropriately addressed to the Federal Court on the merits of the application. The Federal Court will then have the benefit of a full evidentiary record and full argument on the issues. This Court's role in the present appeal is much narrower. We must assess whether Justice Phelan erred in law or made a palpable and overriding error in refusing to interfere with the prothonotary's decision. On this, I see no error.

IV. Conclusion

[18] I would dismiss the appeal with costs.

[19] It should be understood that nothing in these reasons is intended to tie the hands of the Federal Court on the merits of the application for judicial review. My conclusions are based on the high thresholds to meet in the present appeal: palpable and overriding error in the decisions on the motion to strike, and no chance of success in the underlying application.

"George R. Locke"
J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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