Federal Court of Appeal | Cour d'appel fédérale

Date: 20230316

Docket: A-32-22

Citation: 2023 FCA 63

CORAM: **PELLETIER J.A.**
STRATAS J.A.
WOODS J.A.

BETWEEN:

VIAGUARD ACCU-METRICS LABORATORY

Appellant

and

STANDARDS COUNCIL OF CANADA

Respondent

Heard by online video conference hosted by the Registry on March 16, 2023.
Judgment delivered from the Bench at Ottawa, Ontario, on March 16, 2023.

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

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on March 16, 2023).

STRATAS J.A.

[1] This is an appeal from an order of the Federal Court (*per* Favel J.): 2022 FC 16. The Federal Court struck out the appellant's application for judicial review on the ground that the application was premature.

[2] We will dismiss the appeal.

[3] The Federal Court did not commit reversible error in deciding on these facts (at paras. 15-21) that the appellant had to exhaust all of the administrative remedies available to it before applying for judicial review.

[4] The Federal Court properly identified the governing authority on point, *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332, and applied it to the facts of this case. *C.B. Powell*, which applies the Supreme Court authority existing at that time, has received the later approval of the Supreme Court in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364, and has recently been reaffirmed by this Court in *Dugré v. Canada (Attorney General)*, 2021 FCA 8. *Dugré* at para. 37 confirms that the bar against premature judicial reviews must be kept "next to absolute": there is little room for flexibility in the enforcement of this bar.

[5] *C.B. Powell* stands for the proposition that judicial review is a remedy of last resort: if an effective remedy might be available in an administrative or other process, that process first must be pursued. As part of that process, the administrative decision-maker will determine whether it has the jurisdiction to grant the remedy requested and, if so, whether it will grant the remedy. This respects the demarcation of function between administrative decision-makers and reviewing courts that the Supreme Court emphasized in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653.

[6] In this case, the Standards Council of Canada Appeals Policy provides an administrative procedure by which the appellant can challenge an earlier reinstatement decision by filing a complaint. We cannot say with certainty that the appellant would be unable to raise, as part of that procedure, any of the issues raised in its notice of application or that there would be no room for reasonable debate before the administrative decision-maker. Indeed, in response to questioning in oral argument, the appellant candidly admitted that there would be "little room", not no room, for debate before the administrative decision-maker. Thus, the doctrine in *C.B. Powell* applies: the appellant must first pursue that debate and the remedies it seeks in the administrative forum. Judicial review is not available at this time.

[7] In its memorandum of fact and law, the appellant queries whether in fact it can raise the issues it wishes to raise before the administrative decision-maker. The Federal Court found that that is uncertain. This finding is a factually suffused finding of mixed fact and law that can be set aside only on the basis of palpable and overriding error. Here, there is no such error.

[8] Whether the appellant can raise before the administrative decision-maker the issues it wishes to raise is uncertain and, thus, is an issue for the administrative decision-maker to determine. Under this legislative regime, the administrative decision-maker is entitled to consider and determine that issue at first instance. Unless the reviewing court finds that the administrative decision-maker could not reasonably take jurisdiction—a situation that might trigger the remedy of injunction or prohibition envisaged by *C.B. Powell* and related cases—the reviewing court cannot intervene.

[9] We consider it unnecessary to comment on the other issues before the Federal Court.

[10] We note that so far the administrative proceedings have proceeded at a sedate pace. In the interests of all concerned, this matter should proceed quickly.

[11] Therefore, despite the able submissions of counsel for the appellant, we will dismiss the appeal with costs in the fixed, agreed amount of $2,500.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-32-22

APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE FAVEL DATED JANUARY 7, 2022, DOCKET NO. T-1843-19

STYLE OF CAUSE:	VIAGUARD ACCU-METRICS LABORATORY v. STANDARDS COUNCIL OF CANADA
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	MARCH 16, 2023
REASONS FOR JUDGMENT OF THE COURT BY:	PELLETIER J.A. STRATAS J.A. WOODS J.A.
DELIVERED FROM THE BENCH BY:	STRATAS J.A.

APPEARANCES:

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