Federal Court of Appeal | Cour d'appel fédérale

Date: 20240419

Docket: A-267-22

Citation: 2024 FCA 77

Present: **STRATAS J.A.**

BETWEEN:

WESTJET

Appellant

and

OWEN LAREAU

Respondent

and

AIR CANADA

Intervener

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 19, 2024.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20240419

Docket: A-267-22

Citation: 2024 FCA 77

Present: **STRATAS J.A.**

BETWEEN:

WESTJET

Appellant

and

OWEN LAREAU

Respondent

and

AIR CANADA

Intervener

REASONS FOR ORDER

STRATAS J.A.

[1] This is an appeal from a decision of the Canadian Transportation Agency. The Agency is not a party to the appeal. Nevertheless, after the parties to the appeal filed their memoranda of

fact and law with the Court, the Agency presented to the Court its own memorandum of fact and law.

[2] In support of this, the Agency invokes subsection 41(4) of the *Canada Transportation Act*, S.C. 1996, c. 10. Subsection 41(4) provides that the Canadian Transportation Agency "is entitled to be heard by counsel or otherwise on the argument of an appeal" under the Act. The Agency says it can participate as of right in an appeal from its own decision.

[3] For some time now, the Court and other parties have raised questions about the operation of the subsection. Many are canvassed in these reasons. Those questions largely have not been answered.

[4] Fundamentally, can the Agency do what it proposes to do here? Are there any procedural or substantive limits on this?

[5] These questions are surprisingly complex. They have troubled this Court for a long time. Therefore, in this case, the Court issued a direction to the parties to provide submissions on these questions.

[6] Overall, the Court construes this matter as an informal motion for directions under Rule 54 of the *Federal Courts Rules*, S.O.R./98-106.

[7] The Court will grant this motion. It directs that the Agency's memorandum of fact and law shall be filed and the Agency may participate in the hearing of this appeal.

[8] Subsection 41(4) of the Act is rather unique in Canadian law.

[9] Under most administrative regimes, the governing legislation does not give the administrative decision-maker the right to be heard on an appeal from its own decisions. But subsection 41(4) gives that right to the Agency.

[10] Among other things, subsection 41(4) must be seen in light of the context in which it sits. One important part of the context is the case law governing whether and the extent to which an administrative decision-maker can participate in an appeal or judicial review from one of its own decisions.

[11] The current position is that once an administrative decision-maker decides a matter, giving full and adequate reasons for its decision, it is finished with the matter. Theoretically, when a party applies for judicial review of the decision or appeals from the decision, the administrative decision-maker can apply for leave to intervene. But if leave to intervene is granted, the decision-maker must proceed with restraint and caution.

[12] The Supreme Court has expressed very clearly the need for administrative decision-makers who participate in judicial reviews and appeals to proceed with restraint and caution:

Ontario (Energy Board) v. Ontario Power Generation Inc., 2015 SCC 44, [2015] 3 S.C.R. 147; *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684.

[13] Restraint and caution are needed because of an important concern: an administrative decision-maker must be and must appear to be impartial as between the parties. Thus, except in the decision-maker's own interlocutory and final decisions, it should not take sides or appear to take sides.

[14] This concern remains live in a judicial review or appeal. The reviewing court might set aside the administrative decision and return it to the administrative decision-maker for redetermination of the matter on its merits. In the redetermination, the administrative decision-maker will have to act with the appearance and reality of impartiality. If the administrative decision-maker has involved itself in a judicial review or an appeal and aggressively advocates for the position it adopted in its reasons, its appearance and reality of impartiality may suffer.

[15] The sending back of a matter to an administrative decision-maker for redetermination of the merits is not a remote possibility. Far from it. In fact, in cases where reviewing courts set aside decisions, it is the usual remedy. This is because governing legislative regimes almost always empower administrative decision-makers to decide matters on their merits, not reviewing courts. The alternative—the reviewing court deciding the merits of the matter—is truly rare. Reviewing courts impose their view of the merits of the matter only in rarely occurring situations or "limited scenarios" where, for example, no other outcome is available to administrative decision-makers: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65,

[2019] 4 S.C.R. 653 at para. 142 and *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326; and see also *Community Panel of the Adams Lake Indian Band v. Adams Lake Band*, 2011 FCA 37, 21 Admin. L.R. (5th) 105 and *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167 (very compelling public interest reasons).

[16] On this point, the Supreme Court's decision in *Vavilov* remains the law. Recent unexplained deviations from this principle by the Supreme Court, seemingly at odds with *Vavilov*, should not be seen as a departure from the principle: see *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4, *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 and *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, 485 D.L.R. (4th) 583; and for the significance to be attributed to the Supreme Court's unexplained deviations in individual cases, see Paul Daly, "The Signal and the Noise in Administrative Law" (2017), 2016 CanLIIDocs 275.

[17] A further concern is "bootstrapping": administrative decision-makers making submissions to reviewing courts that, in reality, are new reasons supporting the decisions they made. This undermines two principles. First, administrative decision-makers must provide all necessary explanations in support of their decisions in their reasons and, if they fail to do that, their decisions may be set aside: *Vavilov* at para. 83. Second, after administrative decision-makers have decided matters, including explaining themselves in their reasons, they are *functus* or finished and, without legislative authorization, they cannot touch the matters again: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848.

[18] While the Supreme Court in *Ontario Power Generation* does not absolutely prohibit administrative decision-makers from intervening in an appeal, it has underscored the need for them to exercise restraint and caution for many of the reasons just mentioned. *Ontario Power Generation* confirms that a reviewing court in a judicial review or an appeal has the discretion, depending on the circumstances, to prevent, restrain or regulate the involvement of administrative decision-makers.

[19] Before us here is subsection 41(4) of the *Canada Transportation Act*. As a legislative provision, it prevails over any inconsistent judge-made law, such as the judge-made principles set out above, unless the legislative provision is constitutionally invalid: *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781; see also *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2013] 1 S.C.R. 539 at para. 117. *Canada (Attorney General) v. Utah*, 2020 FCA 224, 455 D.L.R. (4th) 714 at para. 28 and *Sturgeon Lake Cree National v. Hamelin*, 2018 FCA 131, 424 D.L.R. (4th) 366 at para. 54.

[20] Subsection 41(4) provides that the Agency "is entitled to be heard by counsel or otherwise on the argument of an appeal" under the Act. Unfortunately, the exact meaning and scope of subsection 41(4) of the *Canada Transportation Act* has never been settled in our jurisprudence. As well, its interrelationship with the *Federal Courts Rules* has never been discussed.

[21] Many questions arise from subsection 41(4) and the Rules. Is the Agency's involvement in an appeal a matter of right or does the Court have a discretion to deny entry into the appeal? When can the Agency involve itself in an appeal? How should it go about it? Does it need to bring a motion to involve itself in an appeal? When should it notify the Court that it intends to involve itself in an appeal? Are there limitations on what the Agency can do in an appeal?

[22] The parties have not acquainted the Court with the purposes underlying subsection 41(4), nor has the Court been able to ascertain them with any specificity. All that can be said is that Parliament was evidently of the view that the Agency may need to have a say in a particular appeal.

[23] To some extent, the Court can understand the reasons behind this. The *Canada Transportation Act* and associated regulations are complex and many of their requirements have serious ramifications for public safety and the larger public interest. These reasons support the view that subsection 41(4) means exactly what its text says: the Agency can involve itself in an appeal whenever it considers it necessary.

[24] There is nothing to suggest that the Agency need be given any formal status before the Court, such as a respondent or an intervener. Subsection 41(4) gives it the right to be heard but it gives it no other rights, such as those possessed by a respondent or an intervener. The presence of the Agency in the appeal will be memorialized by listing the Agency on the backsheet of the Court's reasons. If the Agency requires a higher degree of participation than that afforded to it under subsection 41(4), such as that of a respondent or an intervener, it may seek that by motion.

[25] Parliament introduced subsection 41(4) in 1996, well after the Supreme Court's case of *Northwestern Utilities* in 1978 in which the Supreme Court expressed concern about the involvement of an administrative decision-maker in an appeal from its own decision. *Ontario Power Generation*, a post-1996 decision, in substance does not introduce concerns different from *Northwestern Utilities* but is more permissive than *Northwestern Utilities* about the participation of administrative decision-makers in appeals. One can only conclude that, notwithstanding the concern in *Northwestern Utilities*, Parliament has decided that the Agency should have standing to speak to an appeal from one of its decisions.

[26] Except for one matter, subsection 41(4) does not speak to any procedural issues. In particular, it does not speak to how it should work alongside the Rules. The one matter is that the Agency has the right to be heard as of right. Therefore, the Agency need not ask for leave to participate in the appeal, such as following Rule 109 to seek leave to intervene in the appeal.

[27] In all respects, then, the Rules have full application to the Agency in this context. Foremost among these is Rule 3, the need for proceedings to go forward in the most expeditious and least expensive way. On most occasions, the Agency cannot assess whether to participate in an appeal until it has seen the parties' memoranda. As soon as those memoranda have been filed, if the Agency intends to participate in the appeal, it should notify the Court immediately.

[28] Subsection 41(4) speaks to the Agency being "entitled to be heard by counsel or otherwise". This means literally that, upon advising the Court and the parties of its intention to

participate, the Agency has the right to file a memorandum and make oral submissions, only file a memorandum, or only make oral submissions.

[29] The Agency will have to act in a manner that affords procedural fairness to the other parties. If the Agency intends to make oral submissions at the hearing rather than filing a memorandum of fact and law, before the hearing it will have to disclose, by letter, the nature of those oral submissions to the other parties.

[30] Subsection 41(4) does not impose any limits on what the Agency may address during its participation in the appeal. Nor does it say that there are no limits. Its silence on the issue of limits suggests that the power of the Court to regulate the conduct of an administrative decision-maker participating in the appeal, which pre-existed the enactment of the subsection in 1996, is unaffected. Thus, that power, described in helpful detail in *Ontario Power Generation*, remains available to the Court.

[31] Subsection 41(4) does not speak to the remedial options the Court can adopt in light of the Agency's participation. Thus, the full armory of remedies available to the Court in an administrative appeal remain open to it. This includes, only in rare instances, the ability of the Court to decline to send the matter back to the Agency either because no other outcome is available to the Agency or for some other very compelling public interest reason: see paragraph 15, above.

[32] Suppose the Agency has made submissions before the Court that, in substance or tone, go too far and cast into clear doubt its ability to decide the matter sent back to it for redetermination in a manner consistent with actual or apparent impartiality. That may be the sort of rare situation, based on very compelling public interest reasons, requiring the Court to dictate to the Agency the decision on the merits that the Agency should make.

[33] However, one note of caution is warranted here. Some reviewing courts, sometimes even the Supreme Court, occasionally speak of making the decision on the merits of cases themselves. Some even go as far as to incorporate the decision on the merits of the cases into their formal judgment or order. This practice can be contrary to law.

[34] Under many legislative regimes, such as the regime under the *Canada Transportation Act*, the administrative decision-maker, here the Agency, has the exclusive power to make decisions on the merits of individual cases under the Act. Where a legislative regime empowers only the administrative decision-maker to make decisions on the merits in individual cases, the reviewing court must obey the legislation and, thus, cannot make the order or decision on the merits itself or incorporate that decision into its formal judgment. Rather, it must send the matter back to the administrative decision-maker—the body with the exclusive authority to make the decision on the merits—and issue a *mandamus* order forcing it to make a particular decision or order on the merits.

[35] Another remedial response to inappropriate submissions by an administrative decision-maker is a costs award: *Canadian Pacific Railway Company v. Canada (Transportation Agency)*.

2021 FCA 69; *BNSF Railway Company v. Canadian Transportation Agency*, 2011 FCA 269. *Canadian Pacific Railway Company* also affirms the point, made earlier in these reasons, that *Ontario Power Generation* and *Northwestern Utilities* apply to Agency participations in appeals.

[36] The Agency has presented a memorandum to the Court in support of its entry into the appeal. For the reasons above, the Agency's memorandum shall be filed before the Court. In the circumstances of this case, the other parties shall not file additional memoranda responding to the Agency. They will be able to respond to the Agency's memorandum during the hearing of the appeal. For this purpose, they should be given more time for oral argument than might have otherwise been the case.

[37] Whether the Agency has triggered the concerns in *Ontario Power Generation* and *Northwestern Utilities* and might have to react during the remedial stage of the appeal is for the panel hearing the appeal to decide. However, some observations here may be of assistance.

[38] The main issue in the appeal is one of statutory interpretation and application. Although the Agency says it is only providing helpful information to the Court, in fact it is going further. It offers a particular view of how the statute should be interpreted.

[39] However, one consideration perhaps lessens any concern here: the Court will decide the issues of statutory interpretation itself because the standard of review on issues of statutory interpretation in an appeal from the Agency is correctness. Thus, after the Court decides the appeal, the issue of statutory interpretation will be completely spent. All that the Agency may

have to do in any redetermination is apply the Court's view of the statutory provisions to the facts before it. Provided the Agency stays away from that area in the appeal, it will remain actually and apparently impartial in any redetermination.

[40] Therefore, the motion for directions is granted. The Registry shall accept the Agency's memorandum of fact and law for filing and the Agency may be heard at the hearing of this appeal.

[41] The Court regrets the delay in this matter and encourages the Judicial Administrator to offer the earliest possible hearing dates for the appeal that are convenient to the parties and their counsel.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-267-22
STYLE OF CAUSE:	WESTJET v. OWEN LAREAU AND AIR CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	APRIL 19, 2024

WRITTEN REPRESENTATIONS BY:

Michael Dery Scott Ashbourne Kathryn McGoldrick,	FOR THE APPELLANT
Jean-Marc Leclerc	FOR THE RESPONDENT
Patrick Girard Rémi Leprévost Amara Khy	FOR THE INTERVENER
Allan Matte	FOR THE CANADIAN TRANSPORTATION AGENCY

SOLICITORS OF RECORD:

Alexander Holburn Beaudin + Lang LLP Vancouver, British Columbia	FOR THE APPELLANT
Sotos LLP Toronto, Ontario	FOR THE RESPONDENT
Stikeman Elliott LLP Montréal, Quebec	FOR THE INTERVENER