

Court File No. A-213-23

FEDERAL COURT OF APPEAL

BETWEEN:

Southern Railway of British Columbia Limited

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
FILED	AOUT 24 2023 AUG 24 2023
NATASHA FITTER	
VANCOUVER, BC	1

Appellant

AND:

Vancouver Fraser Port Authority and DP World Logistics Canada Inc.

Respondents

NOTICE OF APPEAL

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at 701 Georgia Street West, 3rd Floor, Vancouver, B.C. V7Y 1K8.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or, if the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

APPEAL

The APPELLANT, Southern Railway of British Columbia Limited (“SRY”), appeals to the Federal Court of Appeal from the Order of the Honourable Madam Justice Heneghan dated August 14, 2023, by which Justice Heneghan allowed the appeal of DP World Logistics Inc. (“DP World Logistics”) filed in Court File No. T-846-21, and ordered costs payable to the Respondents, DP World Logistics and the Vancouver Fraser Port Authority (“VFPA”) in an amount to be agreed upon by the parties or determined by the Federal Court.

THE APPELLANT ASKS that:

1. The Order of the motions judge, Madam Justice Heneghan, dated August 14, 2023, be set aside;
2. The Order of the case management judge, Associate Judge Ring, dated December 9, 2022, be reinstated;
3. The Appellant SRY be awarded the costs of this Appeal and the costs of the underlying proceedings in the Federal Court; and
4. The Appellant SRY be granted such further and other relief as Counsel may advise and this Honourable Court may permit.

THE GROUNDS OF APPEAL are as follows:

A. Overview

5. This appeal arises from a request by the Appellant (and judicial review applicant), SRY, for the transmission of certain materials in the possession of the Respondents, pursuant to Rule 317 of the *Federal Courts Rules*, S.O.R./98-106 (the “Rules”). At first instance, the case management judge, Associate Judge Ring, granted SRY’s request in part. On appeal, the motions judge, Madam Justice Heneghan, set aside the Associate Judge’s Order.
6. In the proceedings below, the Respondents objected to SRY’s Rule 317 request on the basis that, *inter alia*, the Respondent DP World Logistics is not a federal board, commission, or tribunal, and that there is no order of a federal board, commission, or tribunal amenable to judicial review.

7. SRY maintains that the impugned decision is amenable to judicial review on the basis that the Respondents acted as a federal board, commission, or other tribunal in making it, and that the decision constitutes an “order” for the purposes of section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the “*FCA*”) and Rule 317.

B. PARTIES

8. SRY is a provincially regulated short line freight railway in British Columbia. SRY engages in rail operations and provides rail services to customers at various locations within the Port of Vancouver, including in an area known as “South Westminster,” on the south shore of the Fraser River.

9. For several decades, SRY and its predecessor have operated trains in South Westminster within the Port of Vancouver (the “Lands”). In addition to using its own rail trackage, SRY operates on certain port rail trackage located on the Lands, which VFPA owns (the “VFPA Rail Trackage”), and which the Respondent, DP World Logistics, now purports to control. SRY’s own rail trackage connects directly to the VFPA Rail Trackage for the purpose of enabling SRY to provide rail services to port tenants on the Lands. SRY has used the VFPA Rail Trackage to access and service certain port tenants for several decades.

10. The Respondent VFPA is a Canadian port authority established and governed by the *Canada Marine Act*, S.C. 1998, c. 10 (the “*CMA*”) and VFPA letters patent. At all material times, VFPA was the federal agency responsible for the stewardship of the lands and waters within the Port of Vancouver, including the Lands, and had the exclusive authority to fix fees in respect of port activities under the *CMA*.

11. The Respondent DP World Logistics is a company incorporated under the laws of Canada, having a registered and records office located at 2900-550 Burrard Street, Vancouver, British Columbia, V6C 0A3 (Federal Incorporation No. 1248179-1). At all material times, DP World Logistics claimed to be in the business of providing rail traffic control services in respect of some or all of the VFPA Rail Trackage, without specifying the legal capacity in which it was doing so.

C. SRY'S APPLICATION FOR JUDICIAL REVIEW

12. By email correspondence dated May 11, 2021, DP World Logistics informed SRY that it would be imposing a fee tariff (the "Rail Services Tariff") on SRY in respect of certain port activities, namely, rail access to the VFPA Rail Trackage (the "Decision").

13. SRY asserts that the Rail Services Tariff is a "fee" as defined in section 2(1) of the *CMA*. The Rail Services Tariff is a set of charges and fees applicable to the use of VFPA Rail Trackage for the receipt, handling, transportation, and delivery of freight cargo within certain areas of the Lands including (*inter alia*): "switching charges"; "re-switching charges"; a "usage charge"; a "railcar demurrage charge"; and an "external switchers" fee.

14. The fees imposed under the Rail Services Tariff directly impact upon fundamental port activities, such as: the movement of goods by rail; the provision of rail service to port tenants; and the movement and storage of railcars necessary for a port to carry out its central purpose – the facilitation of trade and the shipping and transportation of goods to and from the port.

15. While the Decision to implement the Rail Services Tariff was communicated to SRY by DP World Logistics, it is evident that it was made pursuant to the statutory power to fix fees granted exclusively to VFPA under the *CMA*. To this end, SRY maintains that DP World Logistics acted as the agent, representative, or delegate of VFPA in making the Decision to impose the Rail Services Tariff on SRY.

16. The Decision is amenable to judicial review on the basis that VFPA and DP World Logistics (and each of them) acted as a federal board, commission, or other tribunal in making the Decision to impose the Rail Services Tariff (a "fee" within the meaning of the *CMA*) and that the Rail Services Tariff therefore constitutes an "order" for the purposes of section 18.1 of the *FCA* and Rule 317.

17. By Notice of Application dated May 21, 2021, SRY commenced an application for judicial review in respect of the Decision. In its Notice of Application, SRY seeks, *inter alia*, Orders: (a) quashing the Decision; (b) in the alternative, declaring that the Rail Services Tariff does not apply to SRY; and (c) requiring any funds paid by SRY in respect of the Rail Services Tariff be returned to SRY.

18. In its Notice of Application, SRY also made a request, pursuant to Rule 317(2) of the *Rules*, for the Respondents to transmit and deliver certified copies of the following materials to SRY and the Registry:

- a. any contract or lease agreement concerning the use, operation, or management of the Lands, or purporting to confer upon DP World Logistics the legal authority to impose fees on port users, including (without limitation) the Rail Services Tariff, entered into by VFPA and DP World Logistics, or DP World FSD (defined in the Notice of Application as “DP World Fraser Surrey Limited Partnership, DP World Fraser Surrey Inc., and/or a related corporate entity”), or any other related entity;
- b. any materials relied upon by VFPA, DP World Logistics, DP World FSD, or any other related entity, to devise the fees set out in the Rail Services Tariff;
- c. any correspondence among VFPA, DP World Logistics, DP World FSD, or any other related entity, or any other third parties, regarding the formulation and implementation of the Rail Services Tariff; and
- d. any other documents relevant to a matter in issue in the within proceeding (collectively, the “Requested Materials”).

19. By letter dated September 7, 2021, VFPA filed an objection to SRY’s request for materials under Rule 317 on the basis that the production of the Requested Materials would predetermine that VFPA is a “tribunal” that has made an “order” to impose a “fee,” and that the Requested Materials were not relevant.

20. By letter dated September 8, 2021, DP World Logistics filed an objection to SRY’s request for materials under Rule 317 on the basis that DP World Logistics is not a “tribunal,” that the Decision was not an “order” to impose a “fee,” and the production of the Requested Materials would necessarily predetermine these issues.

21. Following a case management teleconference held on October 13, 2021, at which all parties made submissions on whether the Appellant or the Respondents should be required to bring a motion in respect of the Respondents’ objections to SRY’s Rule 317 request, Associate Judge Ring

issued an Order on October 15, 2021, directing SRY to bring the motion (the “October 15, 2021 Order”). The October 15, 2021 Order included the following term:

4. The Rule 318(2) objections shall be determined by a formal motion to be brought by the Applicant. The parties shall, after conferring with one another and by October 27, 2021, submit a joint proposed timetable for the exchange of motion materials as well as their dates of availability for an oral hearing of the motion.

22. Importantly, the October 15, 2021 Order did not specify the legal standard to be applied on the motion, or otherwise make any determinations on the legal issues to be decided at the hearing of the motion.

23. By Order dated October 22, 2021, the Honourable Chief Justice Crampton appointed Associate Judge Ring as case management judge in the underlying Federal Court proceedings.

24. On December 17, 2021, SRY filed its Notice of Motion and supporting motion record seeking, *inter alia*, an Order pursuant to Rule 318(4) of the *Rules* compelling the Respondents to produce the Requested Materials.

25. By Order dated December 9, 2022, Associate Judge Ring granted SRY’s motion in part, granting the relief sought as against the Respondent DP World Logistics and ordering it to produce certain Requested Materials pursuant to Rule 318(4) of the *Rules* (the “December 9, 2022 Order”).

26. In granting SRY’s motion against DP World Logistics, Associate Judge Ring found that the Respondents were effectively mounting a jurisdictional challenge through their initial objection letters and subsequent submissions in response to SRY’s motion. Accordingly, in determining whether to uphold the Respondents’ objections, she applied the test for a motion to strike, finding that to “hold otherwise would effectively allow the Respondents to sidestep the onerous test on a motion to strike an application by indirectly challenging the jurisdiction of the Court under the guise of a Rule 318 objection to SRY’s request for documents under Rule 317” (para. 24).

27. By Notice of Motion filed on December 19, 2022, DP World Logistics appealed from the December 9, 2022 Order.

28. By Order dated August 14, 2023, Justice Heneghan granted DP World Logistics' appeal and set aside the December 9, 2022 Order with costs payable to DP World Logistics and VFPA. In doing so, the motions judge made the following findings:

- a. that the case management judge set out one process in the October 15, 2021 Order but followed another, which resulted in a breach of procedural fairness to DP World Logistics;
- b. that the case management judge applied the incorrect legal test in granting SRY its motion; and
- c. that the case management judge made findings of fact without regard to the evidence.

29. In allowing the appeal and making the above-noted findings, the motions judge erred in law and in fact, such that the Order should be set aside.

D. ERRORS MADE BY THE MOTIONS JUDGE

30. The motions judge erred in law in applying the correctness standard of review to an interlocutory, discretionary, decision of the case management judge regarding the production of documents, including the case management judge's decision to apply the standard of proof applicable on a motion to strike to SRY's Rule 318 motion, based on her characterization of the Respondents' arguments.

31. Second, the motions judge erred in law in finding that the case management judge breached the principles of procedural fairness and applied the wrong legal test, *inter alia*, by:

- a. misinterpreting the October 15, 2021 Order as establishing the legal test to be applied on SRY's motion;
- b. failing to afford deference to the case management judge's characterization of the Respondents' objections to SRY's Rule 317 request as an attempt to avoid the more onerous test that would apply on a motion to strike (which the Respondents had elected not to bring);

- c. failing to address the governing jurisprudence that the proper forum for the determination of the ultimate issues in a judicial review is at the application hearing; and
- d. failing to consider the Respondents' own acknowledgement that the case management judge could not predetermine the question of whether DP World Logistics is a "tribunal" that has made an "order" for the purpose of the motion.

32. Third, the motions judge erred in law by finding that the case management judge made a palpable and overriding error of fact and interfering with the case management judge's findings of fact in the absence of any palpable and overriding error, *inter alia*, by:

- a. failing to afford deference to the case management judge's assessment of the affidavit evidence and findings of fact;
- b. misapprehending or misconstruing the case management judge's findings of fact to mistakenly conclude that the case management judge implicitly found that DP World Logistics is a "federal board, commission or other tribunal," under section 2 of the *FCA*;
- c. concluding that the case management judge disregarded the Respondents' affidavit evidence, notwithstanding that the case management judge expressly engaged with and cited excerpts of such evidence in the December 9, 2022 Order; and
- d. departing from the rebuttable presumption that the case management judge considered and assessed all of the material placed before her, in the absence of a cogent basis for doing so.

33. Fourth, and in the alternative, the motions judge committed a palpable and overriding error regarding the facts, *inter alia*, by:

- a. finding that the affidavit evidence of the Respondents was dispositive of the legal question of whether the Respondent DP World Logistics is a "federal board, commission or other tribunal," under section 2 of the *FCA*, or affording undue weight to such evidence; and

b. disregarding portions of the Respondent's own affidavit evidence expressly confirming that VFPA retains some level of regulatory or supervisory authority over, and involvement in, the design of the Rail Services Tariff, as cited by the case management judge in the December 9, 2022 Order.

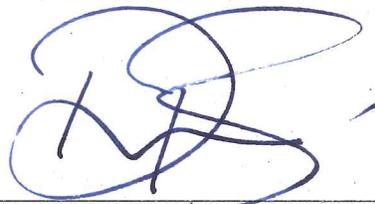
34. The Appellant will also rely, *inter alia*, on the following legislation and rules in support of this Appeal:

- a. *Canada Marine Act*, S.C. 1998, c. 10;
- b. *Federal Courts Act*, R.S.C. 1985, c. F-7; and
- c. *Federal Courts Rules*, S.O.R./98-106.

35. Such other grounds as counsel for the Appellant may advise and this Honourable Court may permit.

36. The Appellant proposes that the Appeal be heard in Vancouver, British Columbia.

Dated at Vancouver, this 24th day of August, 2023.



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