Federal Court of Appeal | Cour d'appel fédérale

Date: 20241025

Docket: A-213-23

Citation: 2024 FCA 175

CORAM: **DE MONTIGNY C.J.**
MACTAVISH J.A.
LEBLANC J.A.

BETWEEN:

SOUTHERN RAILWAY OF BRITISH COLUMBIA LIMITED

Appellant

and

VANCOUVER FRASER PORT AUTHORITY and DP WORLD LOGISTICS CANADA INC.

Respondents

Heard at Vancouver, British Columbia, on September 11, 2024.

Judgment delivered at Ottawa, Ontario, on October 25, 2024.

REASONS FOR JUDGMENT BY: DE MONTIGNY C.J.

CONCURRED IN BY: MACTAVISH J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY C.J.

[1] The appellant, Southern Railway of British Columbia Limited ("SRY"), appeals a decision of Heneghan J. of the Federal Court (the "Motion Judge") dated August 14, 2023 (2023 FC 1105) which set aside an order of Associate Judge Ring (the "Case Management Judge") rendered on December 9, 2022 (Docket: T-846-21). In her order, the Case Management Judge

granted in part SRY's motion requesting the production of documents by the respondents, DP World Logistics Canada Inc. ("DPWL") and Vancouver Fraser Port Authority ("VFPA"), pursuant to Rules 317 and 318 of the *Federal Court Rules*, SOR/98-106 (the "Rules").

[2] Under the guise of a very technical procedural issue, this appeal raises the interesting issue of the proper function of Rules 317 and 318 in an application for judicial review. More particularly, the issue to be decided is whether Rule 317 can be used to compel the production of materials from an entity when the very jurisdiction of the Court over that entity and the decision being challenged is at the core of the debate. How, it may legitimately be asked, can the Court make an order premised on the legitimate exercise of its jurisdiction when that jurisdiction is precisely at issue? While this conundrum has been briefly canvassed in the past, this case offers an opportunity to consider the matter more carefully and to offer some practical avenues out of this quagmire.

I. Factual background and decisions below

[3] This appeal arises in the context of an underlying application for judicial review by SRY in respect of a decision of DPWL to impose various types of charges and fees known as the DP World Fraser Surrey Limited Partnership Rail Services Tariff (the "Rail Services Tariff") for the use of rail lines owned by the respondent VFPA. SRY contends that DPWL does not have the legal authority to impose such a tariff, and that in any event, the manner in which it was enacted does not meet the requirements in the *Canada Marine Act*, S.C. 1998, c. 10 (the "Canada Marine

Act"). Additionally, SRY argues that the tariff does not meet the substantive requirements of the *Canada Marine Act*.

[4] SRY is a provincially regulated short line freight railway in British Columbia that operates, *inter alia*, in South Westminster, the main commercial area of the Port of Vancouver. To serve its customers located in South Westminster, SRY must use rail trackage located on Port of Vancouver lands owned by VFPA, a federal port authority governed by the *Canada Marine Act*. More specifically, SRY uses a lead rail line known as the "Port Lead", and certain yard tracks known as the "Port Authority Rail Yard" (the "PARY").

[5] In its capacity as a federal port authority, the respondent VFPA oversees port facilities and navigable waters in the Port of Vancouver, and has the power to devise and implement fees under section 49 of the *Canada Marine Act.*

[6] VFPA leases and licenses part of its federal lands to different entities belonging to the multinational logistics company Dubai Ports World, to outsource port terminal operations. The respondent DPWL is one of these entities. In fact, DPWL is a federally incorporated extra-provincial company registered in British Columbia, responsible for the day-to-day running of the Port Lead and the PARY, including the management of its infrastructure, operations, repairs and maintenance.

[7] On May 11, 2021, the respondent DPWL informed SRY by email of its decision to start charging them the Rail Services Tariff for the access and use of the Port Lead and the PARY. Up

until then, and for several decades, SRY had not paid any tariff for the use of VFPA rail trackage in the South Westminster area.

[8] In its Notice of Application challenging this decision, SRY included a request pursuant to Rule 317 that both respondents provide materials in their possession relating to the authority to impose Rail Services Tariff fees, as well as their formulation and implementation. SRY alleges that Rule 317 applies to DPWL because it imposed the Rail Services Tariff in its capacity as a representative or agent of VFPA, and DPWL therefore exercised its authority as a federal board, commission or other tribunal (as granted by the *Canada Marine Act*). It claims that these documents are essential in the effective pursuit of a judicial review of DPWL's decision.

[9] The respondents objected to the production of documents pursuant to Rule 318(2). The respondent VFPA argued that it has not acted as a "tribunal" or made an "order" in connection with DPWL's Rail Services Tariff and claimed that granting SRY's request would predetermine the issue as to whether VFPA itself is a federal board, commission or other tribunal. It further claimed that the requested materials were irrelevant to determine the issues raised by SRY, and in particular whether DPWL has legal authority to impose the Rail Services Tariff. The respondent DPWL objected to SRY's motion on the grounds that it is not a federal board, commission or other tribunal; that it did not make an "order" for the purposes of Rule 317; and that did not impose a "fee" under the *Canada Marine Act*. It was also of the view that granting such a request would predetermine these issues.

[10] Following a case management conference, Associate Judge Ring, later appointed as a Case Management Judge, ordered on October 15, 2021 (Docket: T-846-21) that the respondents' objections shall be determined by way of formal motion brought by SRY pursuant to Rules 317 and 318. Interestingly, she came to that conclusion on the following basis:

> In this particular case, I conclude that the Applicant should bring the Rule 318 motion. One of the issues in dispute on the motion is whether there is an "order" of a tribunal, so as to engage Rule 317. The Applicant makes a positive factual allegation in its Notice of Application that the Respondent, [DPWL] made a decision in its capacity as the representative or agent of the other Respondent, the Vancouver Fraser Port Authority. In these circumstances, it is logical for the Applicant to present its motion record first in support of its positive assertion that an "order" has been made, rather than requiring the Respondents to move on the motion to prove a negative assertion (i.e. that no order has been made).

[11] In deciding on the Rule 317 motion, the Case Management Judge granted SRY's request in part. She ordered the production of materials, but limited disclosure to the categories of documents that were relevant and specified, and only those in possession of DPWL, as VFPA was not the decision-maker whose decision is under review.

[12] To reach that conclusion, the Case Management Judge examined whether it was plain and obvious that the respondent DPWL is not a "tribunal" and that it did not make an "order" to impose a "fee" amenable to judicial review (Docket: T-846-21, December 9, 2022 Order at paras. 33 and 50). Crucially, she reasoned that the stringent "plain and obvious" test applicable on a motion to strike ought to apply because the respondents were implicitly challenging the jurisdiction of the Court. Paragraph 24 of her reasons captures the gist of her analysis on that issue:

> In this case, as the Respondents have chosen to effectively mount a jurisdictional challenge to the judicial review application through their objections to SRY's Rule 317 request, rather than bringing a motion to strike. In these particular circumstances, I conclude that the test for a motion to strike should apply in determining whether to uphold the Respondents' objections to the Rule 317 request. In other words, the Court should only uphold the Respondents' objections if it is plain and obvious that there is no "order" of a "tribunal" that is amenable to judicial review. If it is debatable whether the impugned decision is an "order" of a "tribunal", and if the other requirements of Rule 317 are met (e.g. relevance), the tribunal should be required to produce the documents sought. 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.

[13] The respondent DPWL appealed from the Case Management Judge's order to produce the requested documents, seeking a stay of the order until determination of their motion, and for the order to be set aside, with costs. SRY did not appeal the dismissal of their request to obtain documents from the respondent VFPA.

[14] The Motion Judge allowed the respondent DPWL's appeal, and set aside the Case Management Judge's order, with costs to both respondents. The Motion Judge, applying the *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*] standard of review governing decisions made by associate judges, found that the Case Management Judge made reviewable errors of law and of fact.

[15] With respect to the error of law, the Motion Judge agreed with the respondent DPWL that the Case Management Judge erred in establishing one process in her October 15, 2021 Order, namely the Rule 317 motion, and following another, namely the motion to strike test, when dealing with the respondents' objections to this motion in her December 9, 2022 Order. The

Motion Judge held that by doing so, the Case Management Judge had not only applied the wrong legal test, but had also failed to give the respondent DPWL the opportunity to know the case it had to meet, thereby breaching procedural fairness.

[16] As for the error in findings of fact, the Motion Judge held that the Case Management Judge made a palpable and overriding error in failing to take into account affidavits filed by the respondents DPWL and VFPA, which stated that DPWL is a commercial entity acting independently from VFPA, and is therefore not a "tribunal" that made an "order". The Motion Judge found that granting SRY's motion in part inevitably implied that the respondent DPWL was a "tribunal" that made an "order", a conclusion that was, in her view, contrary to the affidavit evidence presented to the Case Management Judge.

[17] SRY now appeals from the Motion Judge's order and asks this Court to set it aside, with costs.

II. Issues

[18] The controlling issue on appeal is whether the Motion Judge made errors subject to review by this Court in finding that the Case Management Judge (1) erred in law and breached the principles of procedural fairness by applying the motion to strike test to the respondents' objections in the context of the Rule 317 motion, and (2) erred in her findings of fact by failing to consider the respondents' affidavit evidence.

[19] Since I am of the view that the appeal should be dismissed and that the order of the Case Management Judge should therefore remain set aside, I will also offer some views as to the appropriate remedy.

III. Analysis

[20] It is by now well settled that the standard of review applicable to the appeal of a decision of an associate judge before the Federal Court is the same as that applicable to decisions of trial judges. As found by this Court in *Hospira*, above, discretionary decisions of associate judges are subject to the standards enunciated by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33. As a result, questions of fact and questions of mixed fact and law are reviewable on the basis of the palpable and overriding error standard, while questions of law and questions of mixed fact and law, where there is an extricable legal principle at issue, are reviewable on a standard of correctness.

[21] Counsel for SRY does not disagree (nor could he) with this general statement of the law, but argues that the Case Management Judge's decision to apply the "plain and obvious" test for objections to the Rule 317 motion was a discretionary decision on a question of mixed fact and law and, as such, is entitled to a high degree of deference. In my view, this is a mischaracterization of the decision reached by the Case Management Judge.

[22] Associate judges and case management judges are obviously in a better position than a reviewing court when assessing whether a document or a category of documents is relevant for

the purpose of a Rule 317 motion. A decision concerning the production of such documents will therefore not be interfered with lightly. However, the determination of the appropriate test when applying the law to a set of facts is always an extricable question of law: see *Pfizer Canada Inc. v. Amgen Inc.*, 2019 FCA 249 at para. 38; *Rahman v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 430 at paras. 2-3; *Tajadodi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1096. Contrary to SRY's submissions, this is not a discretionary case management decision on a non-vital issue, open to numerous reasonable outcomes, but rather a discrete question of law on a vital issue in the context of the underlying judicial review proceeding. I am therefore of the view that the Motion Judge did not err in reviewing the Case Management Judge's decision to apply the "plain and obvious" test on the standard of correctness.

[23] SRY claims that the Motion Judge erred in law in concluding that the Case Management Judge applied the wrong legal test and breached the principles of procedural fairness. In support of its claim, SRY argues that: 1) the Case Management Judge never prescribed the standard of proof to be met in her Order dated October 15, 2021, and therefore did not breach the principles of procedural fairness in following a different process and applying the "plain and obvious test"; 2) the Motion Judge owed a high degree of deference to the Case Management Judge's finding that the respondents were attempting to avoid the more onerous test applicable to a motion to strike, by effectively mounting a jurisdictional issue onto the Rule 317 motion; and 3) the Motion Judge erred in law by failing to consider that an issue can be addressed for the limited purpose of deciding on a preliminary motion without predetermining the ultimate issue to be decided on the merits.

[24] In my view, none of these arguments holds sway. On a Rule 317 motion, the burden falls squarely on the applicant to establish the relevance of the documents sought, as well as the cost effectiveness and proportionality of the order that is being requested. As in any civil proceeding, the standard of proof is based on a balance of probabilities. This is to be contrasted to the test applicable upon a motion to strike, as noted by the Motion Judge, where an applicant must show that a notice of application is so clearly improper as to be bereft of any possibility of success: *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588, 176 N.R. 48 at 600.

[25] This is indeed what the Case Management Judge had in mind when drafting her October 15, 2021 Order. As previously noted, she specified in that order that it was logical to put the burden on SRY to present its motion record in support of its assertion that an order had been made by a tribunal, rather than requiring the respondents to prove a negative assertion. She could have departed, of course, from that process by subsequently varying her order pursuant to Rule 399(2). Yet, no motion asking her to do so was filed by the parties, and, in any event, the requirements to grant such a motion would probably not have been met in this case: see *Ayangma v. Canada*, 2003 FCA 382 at para. 3.

[26] With hindsight, the preferable course of action may well have been for the Case Management Judge to direct the respondents to bring a motion to strike under Rule 221 prior to SRY's Rule 317 motion if they intended to challenge the jurisdiction of the Court to deal with SRY's application for judicial review. Indeed, she was clearly alive to that possibility when she drafted her October 15, 2021 Order. After all, Rules 317 and 318 are premised on the notion that

the Court has jurisdiction to deal with the application for judicial review in relation to which a request for material is made. As this Court stated in *Canadian National Railway Company v. Canadian Transportation Agency*, 2023 FCA 245, Rule 317 is meant to ensure that administrative decisions are subject to meaningful review and public scrutiny. It cannot be relied upon if the jurisdiction of the Court is in doubt. If DPWL is not a tribunal and/or has not made an order, SRY is not entitled to any production. To rule otherwise would put the cart before the horse, and potentially open the door to unwarranted fishing expeditions. As the Federal Court stated in *54039 Newfoundland and Labrador Limited (George Street Association) v. St. John's Port Authority*, 2011 FC 513 (at para. 6):

> Rule 317 cannot be used to compel the production of materials from an entity that is not a federal tribunal. If the GSA's position here were to be accepted, parties could access information they have no entitlement to simply by naming an entity as a respondent in an application for judicial review and requesting production under rule 317. This cannot be the case.

[27] Having chosen to order SRY to bring a Rule 317 motion, it was an error of law for the Case Management Judge to then treat it as a motion to strike and to apply the "plain and obvious" burden of proof on DPWL. In doing so, she did indirectly what she had previously decided was not the proper course of action. I agree with the Motion Judge that this was an error of law.

[28] I also agree with the Motion Judge that it was procedurally unfair to alter the procedure that had been contemplated in the October 15, 2021 Order without any prior notice to the parties. Of course, DPWL was aware that the jurisdictional issue was crucial to the disposition of the underlying application for judicial review. It could not foresee, however, that the legal test and

the burden of proof would shift and that it would bear the onus to show, on a plain and obvious standard instead of the balance of probabilities, that the Rail Services Tariff is an "order" made by a "tribunal" within the meaning of Rule 317.

[29] Procedural fairness requires, at a minimum, that a party be made aware of the case to be met and be given an opportunity to respond to that case: see Sara Blake, *Administrative Law in Canada*, 7th ed. (LexisNexis Canada Inc., 2022), s. 2.05. See also *Nicholson v. Haldimand Norfolk (Regional) Police Commissioners*, [1978] S.C.J. No. 88, 88 D.L.R. (3d) 671; *Arsenault v. Canada (Attorney General)*, 2016 FCA 179. Here, DPWL was led to believe that SRY would bear the burden of proof on its Rule 317 motion and that it would be decided on the usual "balance of probabilities" standard, in application of the usual criteria to determine what material is covered by a Rule 317 request. DPWL was certainly not anticipating that the Case Management Judge would do what she said would not be logical, that is, that she would require DPWL to show on a plain and obvious standard that there was no order of a tribunal amenable to judicial review. Had DPWL known that this was the case it had to meet, it would have had the option to file more evidence, and would obviously have adjusted its arguments accordingly.

[30] Having found that the Motion Judge did not err in determining that the Case Management Judge applied the wrong legal test and breached the principles of procedural justice, there is no need to address SRY's argument to the effect that the Motion Judge allegedly committed a palpable and overriding error regarding the facts. The other two errors identified by the Motion Judge were sufficient, in and of themselves, to quash the Case Management Judge's December 9, 2022 Order.

[31] Before concluding, I wish to add a few words with respect to the alternative remedies available to a party in situations such as this. While Rule 317 was not meant to apply in a context where the jurisdiction to hear an application for judicial review is challenged, there are other avenues to obtain documents that are considered to be necessary by a party to be able to effectively pursue its legal rights. The limited purpose of that rule is to ensure that the Court seized of an application for judicial review and the parties have access to the record that was before the tribunal whose order is challenged. It is not meant to authorize a fishing expedition when it is arguable that there is no "order" made by a "tribunal", nor is it meant as a tool in the hands of creative litigants to kill an application for judicial review before complete disclosure has been made.

[32] To avoid the use of Rule 317 as an indirect summary judgment tool, a party can avail itself of various alternative recourses. The most obvious way to obtain additional evidence derives from Rule 308, whereby a party may cross-examine on affidavits submitted by the opposing side and compel the production of documents by subpoena pursuant to Rule 41. Another potential avenue may be to bring a motion on notice to all affected parties requesting the production of evidence necessary to allow an application to be meaningfully heard and determined, when a party is of the view that there are serious deficiencies in the evidentiary record before the Court: see, by way of analogy, *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128, as cited in *Canada (Health) v. Preventous Collaborative Health*, 2022 FCA 153 [*Preventous*].

[33] The Court itself, of its own initiative or at the request of a party, can order that other material be filed if it considers that the application records of the parties are incomplete: see Rule 313. Apart from the authority granted by that rule, the Court could make use of its general supervisory power in administrative matters (*Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385) and its plenary jurisdiction to make orders necessary for the conduct of proceedings (*Dugré v. Canada (Attorney General)*, 2021 FCA 8) to assist the parties, as recognized in *Preventous* (at para. 18). Finally, the Court could also rely on Rule 4, commonly referred to as the "gap rule", to compel the production of evidence that is considered essential for the efficient resolution of an issue. Needless to say, a party could also invite the Court to draw an adverse inference from missing evidence.

[34] In short, and keeping in mind that as a general rule, only the evidentiary record that was before the administrative decision-maker is admissible on judicial review, there is no dearth of tools at the disposal of the parties and of the Court to ensure that the party challenging the decision is able to mount an effective case, and that the Court, in exercising its reviewing role, is equipped with a full record to assess the defensibility and legality of an administrative decision. At the end of the day, no decision of the executive branch should be immunized from careful and meaningful review by the courts, either as a result of an incomplete record or for any other illegitimate reasons.

IV. Conclusion

[35] On the basis of the foregoing, I would dismiss the appeal, with costs in favour of DPWL.

"Yves de Montigny"
Chief Justice

"I agree.
Anne L. Mactavish J.A."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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