Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Total Oilfield Rentals Limited Partnership, 2012 OHSTC 28

Date: 2012-07-26
Case No.: 2012-25
Rendered at: Ottawa

Between:

Total Oilfield Rentals Limited Partnership, Appellant

and

Attorney General of Canada, Intervenor

Matter:	Adjournment
Decision:	The appeal is adjourned
Decision rendered by:	Mr. Michael McDermott, Appeals Officer
Language of decision:	English
For the appellant:	Mr. Grant N. Stapon, Q.C., Counsel, Bennett Jones LLP
For the respondent:	Ms. Christine A. Ashcroft, Counsel, Department of Justice Canada

REASONS

Background

[1] The decision that follows concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) of directions issued by Health and Safety Officers (HSO) Dawn MacLeod and Lisa Pan. The directions emanate from investigations that followed a November 2010 workplace fatality. This fatality took place at Total Oilfield Rentals Limited Partnership Inc.'s (hereinafter, "Total Oilfield" or "Total") work site, which is a storage yard where it stores for use its rental equipment and which is situated in Grande Prairie, Alberta. Two of the appealed directions are dated November 30, 2010, and two others are dated December 21, 2010.

[2] This is the second time that this appeal has come before an Appeals Officer, as the Occupational Health and Safety Tribunal's (OHSTC) original decision on the matter was brought to the Federal Court on a motion for judicial review by the Attorney General of Canada (hereinafter, the "AG").

[3] On the AG's motion, Total and AG agreed that the original decision must be set aside by the Federal Court and returned to the OHSTC because it was rendered without proper notice being to the AG as required by s. 57 of the *Federal Courts Act*. In addition to supporting this agreement, the Federal Court also ruled that the original appeal decision should be set aside and returned to the OHSTC to be heard by a different Appeals Officer because Health and Safety Officers MacLeod and Pan were not availed the opportunity to make full representations on the issue of jurisdiction during those proceedings.

[4] On February 15, 2012, Total filed an application at Alberta's Court of Queen's Bench for the purpose of having that Court rule on the question of whether Total is subject to federal or provincial regulation.

[5] During a May 22, 2012, conference call, I indicated that I was inclined to adjourn the present appeal proceedings pending the outcome of Total's application before Alberta's Court of Queen's Bench. Respective Counsel for the parties disagreed as to whether or not an adjournment should be granted. As such, I asked Counsel for both parties to provide me with written submissions on the matter.

[6] The parties have since provided me with the requested submissions concerning the adjournment of the present proceedings. The submissions of the AG were received on June 4th, 2012, and Total's submissions on the question were received on June 8th, 2012. Finally, the AG's reply submissions were received on June 19th, 2012.

[7] I have decided to adjourn the present proceedings pending the outcome of Total's case before Alberta's Court of Queen's Bench. This decision will now offer a summary of the submissions provided by the parties, followed by my analysis and final decision on the matter.

Attorney General's Submissions

[8] The Attorney General of Canada (AG) argues that an adjournment cannot be granted by the Occupational Health and Safety Tribunal Canada (OHSTC) in this matter. The AG also argues in the alternative that if the OHSTC can grant an adjournment, it should not do so. The particulars of the Attorney General's argument are as follows:

[9] In a March 2012 ruling, the Federal Court of Canada denied an application by Total Oilfield Rentals Limited Partnership Inc. (Total Oilfield) for a stay of its proceedings. In particular, Total requested a stay pending the hearing and determination of its application to Alberta's Court of Queen's Bench where Total is seeking a declaration on whether it is subject to federal or provincial legislation.

[10] In this denied application, Total Oilfield argued that the Federal Court should stay its proceedings by way of not sending Total's appeal back to the Occupational Health and Safety Tribunal (OHSTC) for redetermination. Total Oilfield argued that this stay should be granted because some of the central issues to be resolved in the OHSTC appeal are going to be heard in the proceedings before Alberta's Court of Queen's Bench.

[11] The Attorney General of Canada argues that because the Federal Court refused to grant the above-mentioned stay on the basis of pending proceedings at Alberta's Court of Queen's Bench, the OHSTC must reject this same argument Total Oilfield is now advancing in favour of the Tribunal granting an adjournment of Total Oilfield's appeal before the Tribunal.

[12] It is also argued by the Attorney General that a stay and an adjournment are the same thing.

[13] In the alternative to the submission that the Tribunal cannot grant an adjournment, the AG argues that if the OHSTC does have the power to adjourn the proceedings before it, it should not do so. More specifically, the Attorney General submits that the Tribunal should be guided by the Federal Court's reasons for refusing to order a stay of Total Oilfield's appeal and use those reasons to lead the Tribunal towards making the decision not to adjourn its proceedings.

[14] Among the reasons cited by the Attorney General is the principle of exhaustion which the Federal Court relied on in rendering its decision. This principle generally holds

that where an administrative decision-making body has been legislatively constituted to hear a specific set of matters, parties must fully pursue these administrative channels of decision making to the furthest end possible before bringing their matter to the Courts. Using the Federal Court's reliance on this principle and citing a range of jurisprudence supporting the doctrine of exhaustion, the Attorney General asserts that because "Parliament has entrusted appeals officers with the exclusive responsibility to determine appeals of Health and Safety matters", the Occupational Health and Safety Tribunal should proceed to hear Total Oilfield's appeal and not grant an adjournment.

[15] Thus, it is submitted by the Attorney General that the OHSTC should be persuaded by the Federal Court's decision to decline the granting of a stay and thereby decide not to adjourn these proceedings before the Tribunal.

[16] In further advancing its position, the Attorney General asserts that the proceedings before Alberta's Court of Queen's Bench and the appeal before the OHSTC are actually two separate matters. This position is elaborated on by noting that the appeal before this Tribunal concerns a November 2010 workplace fatality, whereas the Court of Queen's Bench proceedings concern an August 2011 penalty levied against Total Oilfield for a breach of transportation hours of service legislation. In these latter proceedings Total Oilfield is arguing that it is not subject to the Canada Labour Code.

[17] For all of the above reasons, the Attorney General of Canada submits that due to the Federal Court's related ruling on this matter, the Occupational Health and Safety Tribunal (OHSTC) does not have the power to adjourn Total Oilfield's appeal before the Tribunal, and alternatively, that if the OHSTC does actually have this power, the Tribunal should be guided by the Federal Court decision and decide not to adjourn these proceedings.

Total's Submissions

[18] Total Oilfield argues that this Tribunal does have the authority to grant an adjournment, and that, due to the particular facts of this case, the Tribunal should do so. The particulars of Total Oilfield's submissions are as follows:

[19] Contrary to the Attorney General's submissions, Total Oilfield argues that there is an important difference between a stay and an adjournment. Total asserts that a stay is a judicially ordered procedural option that would "force" the Tribunal to halt its proceedings with a degree of finality that bars the Tribunal from revisiting this decision to adjourn. The granting of an adjournment, on the other hand, is argued to be discretionary in nature, thereby leaving with the Tribunal the power to revisit this decision on its own acceptable terms.

[20] Total Oilfield uses the distinction made between an adjournment and a stay to then stress that the Federal Court's decision exclusively concerned Total's application for the latter, leaving the Tribunal to come to its own conclusions on the question of an adjournment and other procedural decisions that are within the Tribunal's power to make as "master of its own procedure".

[21] Further elaborating on this point, Total argues that the AG did not seek a mandamus to force the Tribunal to proceed, and neither did it attempt to oust the jurisdiction of the Tribunal to determine its own process. Thus, in contestation of the AG's alternative position that the Tribunal should be guided by the Federal Court's decision on how to proceed in the matter, Total asserts that "the Federal Court gave no such guidance. It simply left the process up to this Tribunal."

[22] All of this is raised to ground Total's argument that the Tribunal is not bound by the decision rendered by the Federal Court, and thus has full authority to decide whether to grant an adjournment pending proceedings in Alberta's Court of Queen's Bench.

[23] In addressing the question of whether the Tribunal should grant an adjournment, Total concedes to the authority of the doctrine of exhaustion relied on by the AG. However, Total argues that this doctrine should not prevent the Tribunal from granting an adjournment because this case is an exceptional one, as it chiefly concerns matters that the Tribunal does not usually treat under its jurisdiction and expertise.

[24] More particularly, Total highlights that the Tribunal's expertise is primarily within the domain of occupational health and safety, while the matters pending before Alberta's Court of Queen's Bench, principally concern constitutional determinations on the question of whether Total is to be governed by Federal or Provincial regulation. While acknowledging that the Tribunal is empowered to make constitutional determinations, Total submits that due the Court's specific training and expertise on questions of this nature, the Tribunal should, in this case, defer to Alberta's Court of Queen's Bench.

[25] Total further lists a number of additional reasons why the Tribunal should grant an adjournment. These include the fact that:

[26] All parties who will be affected by the decision will be represented by the Attorneys General of Alberta and Canada, and be able to make submissions before the Court of Queen's Bench;

- The Court has well established procedures for the determination of constitutional facts;

- Total is seeking to have this matter determined on a "rapid basis", and the proceedings in the Court are already "advanced";
- The process and reasoning of the Court's determination and analysis of the constitutional facts will either have binding effect on the Tribunal or offer "great authoritative assistance" to the OHSTC, even if the time period addressed by the Court is different from the one before the Tribunal;
- This particular appeal before the Tribunal is not urgent;
- The decision of the Court may render proceedings before the Tribunal moot or pointless;
- If the Tribunal does not adjourn there will be a duplication of costs and proceedings;
- The Attorney General has not argued any facts or reasons before the Tribunal to suggest that the proceedings or the AG would be prejudiced by an adjournment;
- An adjournment is not necessarily permanent and can be re-assessed depending on developments before the Court.

[27] Total offers all these points as reasonable and compelling grounds upon which the Tribunal should rely to determine that an adjournment should be granted by the Tribunal pending proceedings in Alberta's Court of Queen's Bench. The final reason Total argues to support this position is that the AG retains the right "reapply on short notice to reinstate this appeal"

The AG's Reply Submissions

[28] The Attorney General argues that Total incorrectly states the issues as being whether Total is subject to federal or provincial regulation. In contesting this characterization of the questions before Alberta's Court of Queen's Bench, the AG submits that there are actually two distinct issues before that Court.

[29] The first issue concerns the question of whether federal occupational health and safety legislation (Part II of the *Canada Labour Code*) applies to Total, and the second concerns the question of whether the federal motor carrier legislation applies to the same. The former issue arises out of a decision by the OHSTC, while the latter emanates from proceedings before a provincial board.

[30] The AG asserts that this separation is critical because it helps to highlight that the first issue is one that is more appropriately for the Tribunal to decide, while the second issue is properly before Alberta's Court of Queen's Bench.

[31] The AG also argues that the Tribunal is in a better position than the Court of Queen's Bench to draw out the facts necessary for determining if Total is subject to the *Canada Labour Code*. These facts, the AG asserts, can subsequently be used to support findings of law in proceedings before the Federal Court, which the AG points out has exclusive jurisdiction over the decisions of federal decision making bodies upon the exhaustion of the administrative process. To support these arguments, the AG cites Supreme Court jurisprudence which has found that administrative tribunals have "superior ability to obtain the facts necessary to ground constitutional determinations."

[32] Furthermore, the AG argues that the Court's decision will not take precedence over the Tribunal's ruling in this case because the question of whether the *Canada Labour Code* is applicable to Total will not be treated by the Court. The AG argues that this is the case because this particular determination concerning the *Code* is properly before the Tribunal (and not so before the Court).

[33] The argument that there will be a duplication of costs and proceedings is also rejected by the AG by way of highlighting that this consideration was specifically rejected by Justice Scott when the matter was heard in the Federal Court.

[34] Finally, the AG reasserts that the Federal Court refused to stay its power to direct Total's appeal back to the OHSTC for re-consideration on the basis that there are determinatively relevant proceedings pending before Alberta's Court of Queen's Bench. For this reason, the AG argues that the Tribunal should not grant an adjournment in light of Total's reliance on these same reasons.

Issues

[35] In light of the arguments that have been submitted by both parties, I have come to the determination that there are two central questions that must be treated to fully dispose of this matter. These issues are as follows:

1. In light of the Federal Court's decision to deny Total's stay application, *can* I grant an adjournment in the present appeal?

2. If I can grant an adjournment of the present proceedings, *should* I do so?

Analysis

[36] I would like to thank counsel for both parties for their helpful and informative submissions. Upon careful review of both counsels' arguments and Justice Scott's Federal Court decision, I have ultimately decided to exercise my discretionary authority as an Appeals Officer to adjourn these proceedings. However, before going directly into the reasons for ruling in this way, I will first address the nature of an adjournment as it relates to my authority as an Appeals Officer, under Part II of the *Canada Labour Code*.

[37] Section 146.2 (e) of the *Canada Labour Code*[1] clearly empowers me as an Appeals Officer to adjourn these proceedings. Given the nature of the issue before me now, I feel compelled to emphasize that as a decision-maker of this administrative tribunal, the vested authority permitted to me to refuse or grant an adjournment is discretionary in nature (see: *Omeyaka v. Canada (Minister of Public Safety and Emergency Preparedness)* 2011 FC 78 at para. 13; and *Wagg v Canada* 2003 303 FCA, at para. 19). A most appropriate and pertinent re-statement of jurisprudence on this point is found in *Baltruweit v. CSIS* 2004 CHRT 14, particularly at paragraphs 15 and 16 which read as follows:

> [15] **It is well established that administrative tribunals are the masters of their own proceedings. As such, they possess significant discretion in deciding requests for adjournments.** This principle was discussed in some detail by the Supreme Court of Canada in *Prassad v. Minister of Employment and Immigration*, [1989] 1. S.C.R. 560. In this case, the appellant sought an adjournment of her immigration inquiry pending a decision on her application to the Minister to permit her to remain in Canada. The adjudicator refused the adjournment.
>
> [16] In dealing with her appeal, **the Supreme Court stated that administrative tribunals, in the absence of specific statutory rules or regulations, are masters of and control their own proceedings. But when tribunals exercise judicial or quasi-judicial functions, they must comply with the rules of natural justice.** [See also Re *Cedarvale Tree Services Ltd. and Labourers' International Union of North America*, (1971), 22 D.L.R. (3d) 40, 50 (Ont. C.A.),

[1] **146.2** For the purposes of a proceeding under subsection 146.1(1), an appeals officer may
(*e*) adjourn or postpone the proceeding from time to time;

Pierre v. Manpower and Immigration, [1978] 2 F.C. 849, 851 (FC.T.D.)] [My emphasis added]

[38] The above cited jurisprudence supports my further determination that the wide discretionary authority an Appeals Officer enjoys over his or her own proceedings is limited by the rules of natural justice and procedural fairness. That being said, there is no dispute here as to whether the rules of natural justice and procedural fairness have been anything other than fully and fairly observed in this matter. Indeed, both parties have been given full and ample opportunity to be heard and make their case through the presentation and exchange of written submissions on the question of whether I can and should grant an adjournment to these proceedings.

[39] The above statements concerning my broad discretionary authority to grant an adjournment have been repeated because it is specifically this power that is in dispute in these proceedings.

[40] To be more precise, the crux of the present dispute hinges on the earlier mentioned decision of Justice Scott at the Federal Court (2012 FC 321) to deny Total's stay application, and that decision's effect on the proceedings of the Occupational Health and Safety Tribunal Canada. In light of this, I am of the opinion that it was essential to outline the source and extent of my discretionary authority to grant an adjournment before directly treating the central questions raised in this appeal. That done, the central questions identified in the "Issues" section of this decision will now be addressed.

In light of the Federal Court's decision to deny Total's stay application, can I grant an adjournment in the present appeal?

[41] I am in agreement with the arguments advanced by the Attorney General's counsel which assert that the Occupational Health and Safety Tribunal is bound by the decisions of the Federal Court. However, I am left unconvinced that the instant decision of the Federal Court (2012 FC 321) affects my discretion to grant an adjournment of the present appeal. My reasons follow:

[42] I have reviewed Justice Scott's reasons in the Federal Court's decision to deny Total's stay application. These reasons clearly indicate that with respect to Total's application for a stay, the Federal Court was exclusively seized of a question regarding its *own* proceedings, pursuant to s. 50(1) of the *Federal Courts Act*. Further, Total Oilfield's 'Notice of Motion' initiating those proceedings before the Federal Court attests to the restricted and self-referential nature of the matter in question. In that motion, Total indicated that it was seeking:

i. An order pursuant to s. 50 of the *Federal Courts Act*, staying the referral of this matter back to an Appeals Officer of the Occupational Health and Safety Tribunal of Canada [*sic*] until a decision is rendered in an application brought by Total in the Court of Queen's Bench of Alberta for a determination of whether it is subject to federal or provincial regulation; and

ii. Such further and other relief as [the Federal Court permitted].

[43] To set the context for the discussion of the stay application before him, at paragraph 3 of the Federal Court's decision, Justice Scott reproduced the above words from Total's motion almost verbatim, save the total exclusion of the second point.

[44] The above is highlighted to emphasize two central facts which are critical to the finding that my authority as an Appeals Officer to grant an adjournment remains fully intact despite the Federal Court's decision. The first is that the issue in dispute before the Federal Court was specifically an application for a stay of the referral of an appeal back to an Appeals Officer. The second is that that stay application solely concerned the Federal Court's *own* procedures. In other words, the above is mentioned to emphasize the point that the Federal Court proceedings in no way pertained to an adjournment, nor did they in any way consider or mobilize the Federal Court's authority over this Tribunal's procedural functions.

[45] My findings on the question of whether I can issue an adjournment are aligned with the arguments presented in the submissions of counsel for Total. In recognition of this, it is important to note here that I am also in full agreement with Total's submissions that a stay and an adjournment are not the same thing. In particular, I concur with this distinction in terms of Total's assertion that an adjournment is different from a stay because the former allows me the discretion to both, later re-visit this decision once granted, and subsequently hear submissions from the parties on why the matter should be re-opened and proceed in the event of new developments.

[46] In sum then, I find that the Federal Court's decision does not affect my discretionary authority as an Appeals Officer to grant an adjournment. This determination, as outlined above, is supported by finding that the case before the Federal Court dealt with an entirely different question, namely that of a stay and not an adjournment, and that that question only pertained to the Court's own proceedings, not those of this Tribunal.

[47] On this issue then, I am of the position that the Federal Court's decision does not prevent me from exercising my discretionary authority to grant an adjournment. This analysis will now turn to the question of whether I should exercise this authority.

Having found that I can grant an adjournment of the present proceedings, should I do so?

[48] I am of the opinion that I should adjourn these proceedings pending a decision of Alberta's Court of Queen's Bench on the question of whether Total is subject to provincial or federal legislation.

[49] The first reason undergirding this decision concerns the fact that Alberta's Court of Queen's Bench possesses superior expertise than can be claimed by this Tribunal, specifically when considering the handling of constitutional questions. In other words, Appeals Officers have expertise in federal legislation on occupational health and safety, but are only incidentally experienced in treating constitutional questions like those that Total plans to raise before the Tribunal in this appeal. On the other hand, Alberta's Court of Queen's Bench has the benefit of hearing Total's constitutional arguments as a s. 96 *Constitution Act, 1867* court of inherent jurisdiction that is emboldened with judges who possess more extensive experience in probing the intricacies of constitutional law. It is for this reason that I find that whatever that Court's determination of Total's matter is, the decision that Court renders in terms of its constitutional pronouncements will offer especially useful insight that can inform my own decision when it comes time to pronounce on Total's appeal before the Tribunal.

[50] Intricately related to the first, the second reason that grounds the opinion that I should grant an adjournment is that I am firmly of the position that the reasons and decision that will result from Total's proceedings before Alberta's Court of Queen's Bench will, in a general sense, be most instructive and of very valuable authoritative assistance to this Tribunal. As such, I greatly welcome the assistance that the decision from Alberta's Court of Queen's Bench is likely to provide.

[51] In light of the above, I would like to acknowledge the points raised by the Attorney General concerning doctrine of exhaustion as cited in the case of *Canada (Border Services Agency v. CB Powell Limited* 2010 FCA 61. It is important to note that unlike the appeal before me, that case and certain others cited therein to support the principle of exhaustion dealt with the question of what particular legislation empowered various agencies to do. As such, they did not concern the issue that we have in the present case, namely, the constitutional division of powers with respect to the question of whether an entity is subject to provincial or federal legislation.

[52] As a final consideration, I must say that I am also partially, though not determinatively, swayed by two points. The first is that the Attorney General of Canada has not argued before me that prejudice could be suffered by it or these proceedings in result of my granting of an adjournment. This, coupled with the fact that I am also unable to find that there is a matter of urgency that should press me to proceed with this appeal, has left me assured that it is a most reasonable determination to exercise my discretionary authority in favour of granting an adjournment of these proceedings.

[53] In light of these points, I do find that I should grant an adjournment to these proceedings.

[54] Before concluding these reasons, both parties I would like to assure both parties that once a decision has been rendered by the Court of Queen's Bench, I will see to it that a notice of constitutional issues is sent to the Attorney Generals of Canada and recommence the present proceedings which include the preliminary issue of the applicability of Part II of the *Canada Labour Code* to Total Oilfield.

Conclusion

[55] In conclusion, I have decided to grant an adjournment by virtue of the discretionary powers afforded to me as an Appeals Officer of the Occupational Health and Safety Tribunal. In the event of new facts or developments in Total's matter before Alberta's Court of Queen's Bench, the parties can, of course, request that I review my decision.

Michael McDermott
Appeals Officer