Federal Court of Appeal | Cour d'appel fédérale

Date: 20161116

Docket: A-325-16

Citation: 2016 FCA 284

Present: **STRATAS J.A.**

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Applicant

and

BNSF RAILWAY COMPANY, RICHARDSON INTERNATIONAL LIMITED AND CANADIAN TRANSPORTATION AGENCY

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 16, 2016.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20161116

Docket: A-325-16

Citation: 2016 FCA 284

Present: **STRATAS J.A.**

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Applicant

and

BNSF RAILWAY COMPANY, RICHARDSON INTERNATIONAL LIMITED AND CANADIAN TRANSPORTATION AGENCY

Respondents

REASONS FOR ORDER

STRATAS J.A.

[1] The applicant seeks a stay of certain administrative proceedings (case no. 16-01380) currently before the Canadian Transportation Agency. The applicant did not ask the Agency to suspend its proceedings. Rather, relying on section 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, the applicant comes directly to this Court by way of notice of application.

[2] The Registry sent the notice of application to this Court for examination under Rule 74 of the *Federal Courts Rules*, SOR/98-106. Rule 74 empowers this Court to review a document that has been filed to determine if its filing is not "in accordance with [the] Rules or pursuant to an order of the Court or an Act of Parliament." If that is the case, then the Court can "order that [the] document…be removed from the Court file" but only after the parties have had a chance to make submissions: Rule 74(2); *Rock-St Laurent v. Canada (Citizenship and Immigration)*, 2012 FCA 192, 434 N.R. 144.

[3] In this case, after examining the notice of application, the Court asked the parties for submissions on whether the notice of application should be removed from this Court's file and the court file closed.

[4] The parties have filed their submissions. The Court must now determine whether the filing of the notice of application was proper within the meaning of Rule 74.

[5] In my view, in these circumstances, the filing of the notice of application is contrary to the *Canada Transportation Act*, S.C. 1996, c. 10. Therefore, under the authority of Rule 74, I shall order that the notice of application be removed from the court file and the court file be closed.

[6] In their submissions, the parties devoted some attention to section 50 of the *Federal Courts Act*. Rule 300 of the *Federal Courts Rules* is also potentially relevant. So is the scheme of the *Canada Transportation Act*. In these reasons, I consider these matters in that order.

[7] In my view, no objection can be taken to the applicant's notice of application on the basis of section 50 of the *Federal Courts Act* or Rule 300 of the *Federal Courts Rules*.

[8] Section 50 of the *Federal Courts Act* sets out circumstances where stays can be granted. Relevant here is paragraph 50(1)(*b*) of the *Federal Courts Act*. It allows the Court to grant stays of "proceedings in any cause or matter…where for any other reason it is in the interests of justice that the proceedings be stayed." In my view, this wording, read literally, is broad enough to include stays of administrative proceedings.

[9] That literal reading is supported by other sections in the *Federal Courts Act* and its overall purposes. The Act vests in the Federal Courts broad powers of supervision of the actions of federal boards, commissions and other tribunals: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 443 N.R. 378. The power to stay administrative proceedings is one that a supervisory court would need on occasion to discharge its mandate. The literal wording of paragraph 50(1)(*b*) sets out exactly that power.

[10] In these circumstances, was a notice of application the proper way for the applicant to seek a stay from this Court under paragraph 50(1)(*b*)? In my view it was. Rule 300 of the *Federal Courts Rules* allows for "proceedings required or permitted by or under an Act of Parliament to be brought by an application, motion, originating notice of motion, originating summons or petition." A stay is a proceeding that is "permitted by or under an Act of Parliament," namely the *Federal Courts Act*, paragraph 50(1)(*b*). In a case like this, where there

is not already a subsisting proceeding before the Court, an originating document, such as a notice of application, should be filed. This the applicant did.

[11] I note for completeness that had the applicant erred and filed a notice of motion rather than an application, the matter could have been cured by resort to Rule 57.

[12] I now turn to a particular submission made by the respondents, one that, as we shall see, requires us to consider the scheme of the *Canada Transportation Act*.

[13] The respondents submit that the notice of application should be removed from the file because the applicant has proceeded prematurely to the Court. The respondents note that the applicant did not ask the Agency to adjourn its proceedings. They say that asking the Agency to adjourn its proceedings was an adequate alternative recourse the applicant should have pursued before seeking a stay in this Court.

[14] There is much force in this submission. Where, as here, a party is seeking to stay an administrative decision-maker's proceedings, the party is actually seeking prohibition of those proceedings. It is requesting an order that the administrative decision-maker stop its proceedings. In circumstances such as these, the standards governing the grant of a section 50 stay of an administrative decision-maker's proceedings must mirror those for the grant of prohibition.

[15] Just as prohibition is an administrative law remedy that should not be pursued where there is adequate alternative recourse or a lack of extraordinary circumstances or unusual

urgency (see *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332), the same is true for an application for a stay of the sort brought here. The rationales preventing early or premature access to a reviewing court canvassed in *C.B. Powell* at para. 32 apply equally here too.

[16] This is not just judge-made doctrine. It falls out of the scheme of the *Canada Transportation Act*, a law binding upon this Court. Under the *Canada Transportation Act* Parliament has given the Agency full power over proceedings before it, including determining whether the Agency should adjourn or suspend proceedings before it. Allowing parties to bypass the Agency and go directly to court to suspend the Agency's proceedings would offend that statutory scheme. It would not be in accordance with or pursuant to the *Canada Transportation Act*.

[17] There may be circumstances of exceptionality or unusual urgency such that immediate recourse to the Agency is not adequate (see *e.g.*, *C.B. Powell*, above at para. 33) and immediate access to a court must be permitted. In this case, I need not comment further: the notice of application reveals no circumstances of unusual urgency or other exceptional reasons why immediate access to a court is necessary.

[18] The applicant did not first ask the Agency to suspend or adjourn its proceedings. It should have. Instead, it proceeded directly to this Court by way of notice of application. Proceeding directly to this Court in these circumstances is contrary to the statutory scheme in the *Canada*

Transportation Act. Therefore, under Rule 74, the notice of application should be removed from the Court file and the court file closed.

[19] As well, a second, related objection is well-founded in my view: in these circumstances the notice of application improperly bypasses the jurisdictional limitations imposed on this Court by subsection 41(1) of the *Canada Transportation Act*.

[20] Had the applicant asked the Agency to suspend or adjourn its proceedings, the Agency would have decided that matter. An appeal to this Court from that decision might have then been possible under subsection 41(1) of the *Canada Transportation Act*. But under that subsection, this Court can only entertain appeals from the Agency on "questions of law" and "questions of jurisdiction."

[21] Here, even if the applicant had asked the Agency to suspend or adjourn its proceedings and the Agency had refused, a notice of appeal raising the grounds that the applicant raised in the notice of application now before this Court would not satisfy the requirement that there be "questions of law" or "questions of jurisdiction." While this Court has interpreted the requirement in subsection 41(1) liberally, there needs to be "enough of a legal component" to the issue raised: *Northwest Airlines Inc. v. Canadian Transportation Agency*, 2004 FCA 238 at para. 28, 325 N.R. 147; *Canadian National Railway Company v. Canada (Transportation Agency)*, 2016 FCA 266 at para. 22. Here there is none. The notice of application merely asserts that the continuance of the case is duplicative of other proceedings and an abuse of process, nothing more.

[22] One last issue must be determined. Is this application to be determined by one judge or by three judges of this Court? In other words, do I have the jurisdiction to decide this matter as a single judge?

[23] The parties did not raise this issue but that does not matter. The Court must still satisfy itself that it has the power to act: *Re McKittrick Properties Ltd.* (1926), 59 O.L.R. 199 (C.A.); *Manie v. Ford (Town)* (1918), 14 O.W.N. 83 (H.C.), aff'd (1918), 15 O.W.N. 27 (C.A.). The Court can never assume or presume it has jurisdiction over a matter, nor can it ever exercise a jurisdiction that it does not have: *Brooke v. Toronto Belt Line Railway Company* (1891), 21 O.R. 401; *C.N.R. v. Lewis*, [1930] Ex. C.R. 145. This is a bedrock principle of our democracy, one that has been on the books for at least a quarter of a millennium and one that remains good law: see *e.g.*, *Green v. Rutherford* (1750),1 Ves. Sen. 462 at page 471; *Penn v. Lord Baltimore* (1750), 1 Ves. Sen. 444 at page 446; *A.G. v. Lord Hotham* (1827), 3 Russ. 415; *Thompson v. Sheil* (1840), 3 Ir. Eq. R. 135. Reflecting the venerable and fundamental nature of this principle, this Court has held that jurisdictional matters such as this should be decided before embarking upon any consideration of the merits of the case: *National Indian Brotherhood v. Juneau (No. 2)*, [1971] F.C. 73 (C.A.). Therefore, before considering the merits of this application, I carefully considered my jurisdiction to act as a single judge.

[24] Under subsection 16(1) of the *Federal Courts Act*, "[e]xcept as otherwise provided in [the *Federal Courts Act*] or any other Act of Parliament"—a proviso that does not apply here—applications for leave to appeal, applications for judicial review and references must be

determined by at least three judges. The application here does not fall within these categories and so it need not be determined by at least three judges.

[25] Subsection 16(1) goes on to say that "[o]therwise, the business of the Federal Court of Appeal shall be dealt with by such judge or judges as the Chief Justice of that court may arrange." This contemplates that applications other than applications for leave to appeal and applications for judicial review may be determined by a single judge if the Chief Justice arranges for a single judge to hear it. In this case, the Chief Justice has arranged for me to deal with this application as a single judge.

[26] Therefore, in my view, I have the jurisdiction as a single judge to determine this application.

[27] I note that in a related application before the Court, the applicant seeks leave to appeal from an interlocutory decision (decision LET-R-43-2016 dated September 7, 2016) made by the Agency in the same case (case no. 16-01380). The Court has not yet determined that application. If this Court grants leave to appeal, the applicant is at liberty to bring a motion for a stay of the case pending determination of the appeal. The determination of this application is without prejudice to the applicant's ability to bring such a motion.

[28] For the benefit of future cases I see no reason in this case why the applicant did not bring its motion within the application for leave to appeal, rather than doing what it did here—launching an entirely separate application. Bringing a motion within a subsisting proceeding is

the more conventional and simpler way to proceed. It may have substantive effects too: separate applications, such as the one here, smack of an application for prohibition and may be governed by the law of prohibition, not the law governing interlocutory stays set out in *RJR—MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385. Perhaps the law in these two areas is converging so that does not matter; I need not decide this here. However, either way—as set out in *C.B. Powell*, above, at para. 33 and cases that apply that holding—premature forays to a reviewing court are frowned upon unless the moving party can demonstrate unusual urgency or exceptionality within the meaning of the cases.

[29] For the foregoing reasons, I will order that the notice of application be removed from the court file and the court file be closed. Costs will be awarded to the respondents.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-325-16
STYLE OF CAUSE:	CANADIAN NATIONAL RAILWAY COMPANY v. BNSF RAILWAY COMPANY,

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	NOVEMBER 15, 2016

WRITTEN REPRESENTATIONS BY:

Douglas C. Hodson, Q.C.	FOR THE APPLICANT
Ian S. MacKay	FOR THE RESPONDENT, BNSF RAILWAY COMPANY
Lucia M. Stuhldreier Carolyn J. Frost	FOR THE RESPONDENT, RICHARDSON INTERNATIONAL LIMITED
Simon-Pierre Lessard Tim Jolly	FOR THE RESPONDENT, CANADIAN TRANSPORTATION AGENCY

SOLICITORS OF RECORD:

MacPherson Leslie & Tyerman LLP Saskatoon, Saskatchewan	FOR THE APPLICANT
Ian S. MacKay Ottawa, Ontario	FOR THE RESPONDENT, BNSF RAILWAY COMPANY

Aikins, MacAulay & Thorvaldson LLP Winnipeg, Manitoba	FOR THE RESPONDENT, RICHARDSON INTERNATIONAL LIMITED
Canadian Transportation Agency Gatineau, Quebec	FOR THE RESPONDENT, CANADIAN TRANSPORTATION AGENCY