Federal Court of Appeal | Cour d'appel fédérale

Date: 20090630

Docket: A-439-08

Citation: 2009 FCA 219

CORAM: **SHARLOW J.A.**
RYER J.A.
TRUDEL J.A.

BETWEEN:

JOHNSTON CANYON CO. LTD.

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Calgary, Alberta, on June 11, 2009.

Judgment delivered at Ottawa, Ontario, on June 30, 2009.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: SHARLOW J.A.
RYER J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20090630

Docket: A-439-08

Citation: 2009 FCA 219

CORAM: **SHARLOW J.A.**
RYER J.A.
TRUDEL J.A.

BETWEEN:

JOHNSTON CANYON CO. LTD.

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

TRUDEL J.A.

[1] This appeal arises out of the refusal of the Minister of the Environment, then the Honourable Rona Ambrose (the Minister), to grant a new lease to the appellant Johnston Canyon Co. Ltd. (Canyon) at a rental rate to be selected by the appellant. In a decision dated August 14, 2008 (2008 FC 940), Mosley J. dismissed Canyon's application for judicial review of the Minister's decision. Canyon has appealed the decision of the applications judge to this Court.

[2] For the reasons that follow, I am of the view that this appeal cannot succeed.

The relevant facts

[3] Since 1927, Canyon has run a seasonal accommodation facility, consisting largely of rustic bungalows, in Banff National Park. Canyon is one of several entities operating out of national parks that are classified by Parks Canada as Outlying Commercial Accommodation (OCA).

[4] In 1963, Canyon and the Crown signed a lease for 42 years, which was to expire on December 31, 2004. That lease contained a right of renewal for a further 21-year term "at a rent to be determined by the Minister" (then, the Minister of Northern Affairs and Natural Resources).

[5] Well before the expiration of the 42-year term, the Minister of Canadian Heritage imposed a moratorium on OCA development in the mountain national parks. A panel was appointed to review the OCA development issue and to deliver reports, which would later serve as the basis for the Parks Canada's guidelines respecting OCAs. However, Parks Canada did not accept certain of the panel's recommendations respecting Canyon's facility because of ecological concerns. These concerns translated into site-specific guidelines applicable to Canyon, which were detailed in a letter sent to the appellant by Parks Canada dated May 30, 2001.

[6] This letter initiated a series of unsuccessful negotiations between Canyon and Parks Canada for a mutually-acceptable redevelopment plan and a new lease. The issues in contention included redevelopment, the length of a replacement lease, and the rental rate.

[7] Effective May 21, 2004, Parks Canada adopted a Revised Policy Directive for Commercial Rent Setting (Policy Directive), which applied to all commercial leases for lands under the administration of Parks Canada, including Canyon's OCA. According to the Policy Directive, if the Minister accepted the surrender of a lease, a new replacement lease would be granted with rent based on a negotiated percentage of gross revenue. However, if prior to May 20, 2004 "substantive negotiations" had been completed between Parks Canada and the lessee regarding the surrender of an existing lease and the granting of a replacement lease, the lessee would be permitted to select another rental rate pursuant to subsection 6(1) of the *National Parks of Canada Lease and Licence of Occupation Regulations*, S.O.R./92-25 (Regulations).

[8] In June 2005, having not agreed on the terms of a new lease, Canyon exercised its right of renewal of the 1963 lease, which would now expire on December 31, 2025 (Renewal Lease). However, Canyon continued its attempt to obtain Parks Canada's approval of a redevelopment proposal. After several letters were exchanged between Parks Canada and Canyon regarding the redevelopment, Parks Canada sent a letter to the appellant dated August 17, 2006, which outlined the acceptable terms of a new lease. More specifically, the letter stated that if Canyon wished to enter into a lease having a longer term than the existing Renewal Lease, the new lease must be in line with the Policy Directive and thus subject to rent based on the application of a negotiated percentage of gross revenue.

[9] It is this letter which forms the basis of Canyon's judicial review application.

The Regulations

[10] The Minister's authority to accept the surrender of a lease and to grant a new lease is found in section 3 of the Regulations.

3. (1) Subject to subsection (2) and sections 4 and 19, the Minister may, for any term not exceeding 42 years and on such terms and conditions as the Minister thinks fit, grant leases of public lands …	**3.** (1) Sous réserve du paragraphe (2) et des articles 4 et 19, le ministre peut octroyer des baux d'une durée d'au plus 42 ans, selon les modalités qu'il juge indiquées, à l'égard des terres domaniales situées : […]
(*e*) outside the Town of Banff or the Town of Jasper, visitor centres and resort subdivisions for the purposes of tourism, schools, churches, hospitals, service stations and places for the accommodation, recreation or entertainment of visitors to the parks.	*e*) à l'extérieur de la ville de Jasper, du périmètre urbain de Banff, des centres d'accueil et des centres de villégiature, aux fins de tourisme, d'écoles, d'églises, d'hôpitaux, de stations-service, de logement et de lieux de divertissement ou de récréation pour les visiteurs des parcs.
…	[…]
(8) The Minister may accept the surrender of a lease of public lands.	(8) Le ministre peut accepter l'annulation du bail visant des terres domaniales.

[11] Subsection 6(1) of the Regulations dictates the rental rates available to the lessee.

6. (1) At the time a lease is granted, the lessee shall choose a rental rate set out in section 7, 8, 11, 13 or 14 that is applicable to the location, use and conditions of occupancy of the leased public lands and	**6.** (1) À l'octroi du bail, le preneur doit choisir, parmi les taux prévus aux articles 7, 8, 11, 13 et 14, le loyer qui est exigible d'après l'emplacement, l'usage et les conditions d'occupation des terres

the purpose for which the lease is granted, and that rental rate shall be a term of the lease.	domaniales louées, ainsi que les fins auxquelles le bail est octroyé; ce loyer est indiqué dans le bail.

[12] There is no dispute that the provision applicable to Canyon's OCA is section 11 of the Regulations. This provision lists several rental rates, including Canyon's preferred rate, wherein the rent is calculated on the basis of a percentage of the appraised land value, and the rate preferred by Parks Canada, wherein the rent is calculated on the basis of a percentage of gross revenue.

The Federal Court Decision

[13] On the basis of the parties' arguments and the evidence before him, the applications judge concluded that the August 17, 2006 decision was made in accordance with the *Canada National Parks Act*, S.C. 2000, c. 32 (the Act) and the Regulations. He found that it was open to the Minister to decline to accept the surrender of the Renewal Lease and to refuse to grant a new 42-year lease on the terms sought by the appellant.

[14] The applications judge applied the standard of review of correctness to issues of jurisdiction and legitimate expectations, and the standard of reasonableness to the exercise of the Minister's discretion.

[15] The applications judge envisioned the process relating to the granting of a new lease to occur in two steps: (1) the Minister makes a discretionary decision to grant a lease pursuant to

subsection 3(1) of the Regulations, fettered only by subsection 3(2), section 4, and section 19; (2) once the decision is made, the lessee makes the choice of rental rate pursuant to subsection 6(1) (reasons for judgment of Mosley J. at paragraphs 23, 25). Thus if the Minister declined to grant a lease pursuant to subsection 3(1), the second step would never come into play.

[16] Furthermore, the applications judge found that no "substantial negotiations" had taken place between Parks Canada and Canyon before May 20, 2004, such that Canyon would be able to choose its rental rate pursuant to the Policy Directive (*ibid.* at paragraph 26).

[17] The applications judge also responded to Canyon's assertion that the Minister had discriminated between it and other OCAs by allowing other OCAs to select their rental rate. Relying on this Court's decisions in *Parks Canada v. Sunshine Village Corp.*, 2004 FCA 166, [2004] 3 F.C.R. 600 and *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2007 FCA 273, [2008] 2 F.C.R. 341, he held that it was within the authority of the Minister to discriminate unless her actions were contrary to public policy (reasons for judgment of Mosley J. at paragraphs 29-30). Furthermore, he found that there was no clear evidence of discrimination with respect to the respondent's treatment of other OCAs.

[18] Finally, the applications judge concluded that the Minister's decision did not breach Canyon's legitimate expectation of obtaining a new lease with its desired rental rate. The applications judge noted that the doctrine of legitimate expectations can only give rise to procedural rights and, in any case, no substantive promises were made by the Minister. He found that the

appellant was given many opportunities to respond to the Minister's assertion that Canyon's only option was a new lease subject to a rental rate based on a negotiated percentage of gross revenue (*ibid.* at paragraphs 36-38).

Issue

[19] As held by this Court in *Canada Revenue Agency v. Telfer*, 2009 FCA 23, 386 N.R. 212, the role of this Court on an appeal from a decision disposing of an application for judicial review is to determine "whether the court below identified the appropriate standard of review and applied it correctly" (*ibid.* at paragraph 18).

[20] Both parties are in agreement that the standards of review applied by the applications judge were the appropriate ones. I agree. Accordingly, the only issue for this Court is whether the applications judge applied these standards correctly to the facts before him.

Analysis

[21] The appellant submits that the applications judge erred in failing to find that the Minister had abused the discretion afforded to her in section 3 of the Regulations. It asserts that subsection 6(1) of the Regulations gives the lessee a statutory right to select the rental rate of its choice and that this right fetters the Minister's discretion. According to the appellant's interpretation of the Regulations, the Minister can never trump the lessee's right to pick its rental rate.

[22] I agree with the conclusion of the applications judge that it was within the Minister's discretion to refuse to accept the surrender of the current lease and to refuse to grant a new lease except on the basis of a rental rate based on a percentage of gross revenue.

[23] Section 8 of the Act gives both powers and duties to the Minister. It states:

8. (1) The Minister is responsible for the administration, management and control of parks, including the administration of public lands in parks and, for that purpose, the Minister may use and occupy those lands.	**8.** (1) Les parcs, y compris les terres domaniales qui y sont situées, sont placés sous l'autorité du ministre; celui-ci peut, dans l'exercice de cette autorité, utiliser et occuper les terres domaniales situées dans les parcs.
(2) Maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Minister when considering all aspects of the management of parks.	(2) La préservation ou le rétablissement de l'intégrité écologique par la protection des ressources naturelles et des processus écologiques sont la première priorité du ministre pour tous les aspects de la gestion des parcs.

[24] Accordingly, given the responsibilities and powers allotted to the Minister, it is unsurprising that section 3 of the Regulations affords the Minister a broad discretion in dealing with leases of public lands.

[25] As noted above, the Minister is under no obligation to accept the surrender of a lease. The use of the word "may" denotes that, while she is given the power to accept the surrender of a lease, she has the discretion to refuse. In addition to the word "may", subsection 3(1) gives the Minister the authority to grant leases "on such terms and conditions as the Minister thinks fit". Accordingly,

the Minister may be guided by a rental rate policy, such as the Policy Directive at issue, in exercising its discretion to grant leases.

[26] Furthermore, I note that, contrary to the appellant's interpretation, subsection 6(1) does not give the lessee an absolute right to select its rental rate, nor does it fetter the Minister's discretion. It merely requires the lessee, when granted a lease, to select a rate in accordance with the criteria set out in subsection 6(1); namely, one that is "set out in sections 7, 8, 11, 13 or 14 that is applicable to the location, use and conditions of occupancy of the leased public lands and the purpose for which the lease is granted". The existence of subsection 6(1) does not preclude the Minister from determining that a lease will not be granted unless the lessee consents to a rental rate acceptable to the Minister.

[27] The appellant obtained every right contractually owed to it pursuant to the 1963 lease, including its right to a 21-year renewal lease. The surrender of that lease and the granting of a new lease were not based on such a right, but were in the discretion of the Minister. Accordingly, I find that the Minister's exercise of this discretion was reasonable in the circumstances.

[28] The appellant also raised another aspect of its abuse of discretion argument before the applications judge. It asserts that, unlike Canyon, other OCAs were permitted to select the rental rate of their choice. Accordingly, the appellant submits that the applications judge erred in failing to find that the Minister abused her discretion by discriminating against Canyon.

[29] I do not agree with this assertion. The applications judge rightly held that it was within the Minister's discretion to negotiate different lease terms with different OCAs. Furthermore, I note that the circumstances of each OCA, including the precise location of the leased land, are different. This Court is not equipped to differentiate between OCAs in order to determine if Canyon was treated discriminatorily.

[30] Accordingly, I find that the Minister did not abuse her discretion by discriminating against Canyon, or for any other reason raised by the appellant.

[31] Finally, the appellant submits that the applications judge erred in failing to find a breach of its legitimate expectations. While it concedes that the legitimate expectations doctrine does not give rise to substantive rights, the appellant claims that it is simply asserting a procedural right to have the Minister review Canyon's lease proposal in accordance with subsection 6(1) of the Regulations.

[32] In my view, the appellant is merely attempting to cloak its argument for a new lease with a rental rate of its choosing, clearly a substantive right, in procedural language.

[33] The Supreme Court of Canada's decision in *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249 makes it clear that the doctrine of legitimate (or reasonable) expectations can only be used to create procedural, and not substantive, rights. At paragraph 78, Arbour J. held:

> The doctrine of reasonable expectations does not create substantive rights, and does not fetter the discretion of a statutory decision-maker. Rather, it operates as a component of procedural fairness, and finds application when a party affected by an administrative decision can establish a legitimate expectation that a certain procedure would be followed: *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557; *Baker*, *supra*, at para. 26. The doctrine can give rise to a right to make representations, a right to be consulted or perhaps, if circumstances require, more extensive procedural rights. But it does not otherwise fetter the discretion of a statutory decision-maker in order to mandate any particular result: see D. Shapiro, *Legitimate Expectation and its Application to Canadian Immigration Law* (1992), 8 J. L. & Social Pol'y 282, at p. 297.

[34] In any case, the applications judge found that there had been no substantive negotiations which, based on the Policy Directive, would have allowed Canyon to choose its rental rate.

[35] Accordingly, I find that the appellant's legitimate expectations argument must fail.

Conclusion

[36] I find that the applications judge correctly applied the standards of review to the Minister's decision. Consequently, I would dismiss the appeal with costs to the respondent.

"Johanne Trudel"
J.A.

"I agree
K. Sharlow J.A."

"I agree
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-439-08
APPEAL FROM A DECISION OF MOSLEY J. OF THE FEDERAL COURT (2008 FC 40), DATED AUGUST 14, 2008.	
STYLE OF CAUSE:	Johnston Canyon Co. Ltd. v. The Attorney General of Canada
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	June 11, 2009
REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	SHARLOW J.A. RYER J.A.
DATED:	June 30, 2009

APPEARANCES:

Judson Virtue	FOR THE APPELLANT
Bruce Hughson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MacLeod Dixon LLP Calgary, Alberta	FOR THE APPELLANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT