Federal Court of Appeal

Cour d'appel fédérale

Date: 20110928

Docket: A-25-11

Citation: 2011 FCA 269

CORAM: **NOËL J.A.**
PELLETIER J.A.
DAWSON J.A.

BETWEEN:

BNSF RAILWAY COMPANY,
CANADIAN NATIONAL RAILWAY COMPANY and
CANADIAN PACIFIC RAILWAY COMPANY

Appellants

and

CANADIAN TRANSPORTATION AGENCY,
QUAYSIDE COMMUNITY BOARD,
BRIAN ALLEN and
MATTHEW LAIRD

Respondents

Heard at Vancouver, British Columbia, on September 20, 2011.

Judgment delivered at Ottawa, Ontario, on September 28, 2011.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NOËL J.A.
PELLETIER J.A.

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REASONS FOR ORDER

DAWSON J.A.

[1] The issue to be determined on this appeal is whether the Canadian Transportation Agency (Agency) erred in law in determining that it could adjudicate a complaint concerning noise and vibration arising from operations at the New Westminster Rail Yard, notwithstanding that the parties had previously entered into a settlement agreement with respect to the same complaint. The decision of the Agency is cited as LET-R-152-2010.

[2] For the reasons that follow, I would allow the appeal.

Factual Background

[3] On July 4, 2008, the Quayside Community Board (Community Board) filed a complaint with the Agency. The Community Board advised that it represented 2080 strata units which were directly impacted by the noise and vibration caused by rail company operations in the New Westminster Rail Yard. The complaint was made against four rail companies: the BNSF Railway Company, the Canadian National Railway Company, the Canadian Pacific Railway Company and the Southern Railway of British Columbia (together the Railway Companies). The Community Board sought, among other things, an order restricting use of the rail yard to between the hours of 7 a.m. and 10 p.m.

[4] The *Canada Transportation Act*, S.C. 1996, c. 10 (Act) and the Agency's Guidelines for the Resolution of Complaints Concerning Railway Noise and Vibration (Guidelines) provide that before the Agency can investigate a complaint regarding railway noise and vibration, it must be satisfied that the collaborative measures set out in the Guidelines have been exhausted. In the present case, with the agreement of the parties, the complaint was referred to mediation. The Guidelines and the statutory regime established by the Act are discussed below.

[5] The mediation proceeded under section 36.1 of the Act with the assistance of two Agency-appointed mediators. At the conclusion of the mediation session the parties entered into a confidential settlement agreement dated December 10, 2008. The settlement agreement was signed

by two representatives of the Community Board and by representatives of each rail company and the City of New Westminster. The parties, together with the mediators, also signed a Disposition Statement in which they confirmed that they had "fully resolved the aforementioned dispute to the satisfaction of all parties." In this document the parties also consented to the closing of the Agency's file concerning the Community Board's complaint.

[6] On April 13, 2010, the Community Board filed a second complaint with the Agency against the Railway Companies. After expressing concern that the Railway Companies had not communicated with the Community Board as they were obliged to do under the settlement agreement, the second complaint advised that "[u]nfortunately, this mediated solution has failed." The Community Board requested "the specific relief we originally requested in the attached copy of the original complaint." No allegation was made that there had been any material change in facts or circumstances. At this time, the Community Board did not allege any irreparable breach of the settlement agreement.

[7] The Agency provided copies of the second complaint to the Railway Companies and gave them 30 days to respond to its complaint. The Agency characterized the complaint to be one that "the mediation process in this complaint has failed."

[8] The Railway Companies responded that there was a valid and binding settlement agreement in place so that the matter could not be adjudicated by the Agency. Any disagreement in respect of the implementation of the settlement agreement could only be referred back to a

reconvened mediation session. See: responses of the Railway Companies at pages 55 to 57, 59, 63-64 and 65-68 of the Appeal Book.

[9] The Community Board replied to the submissions of the Railway Companies in an e-mail dated June 11, 2010. The Community Board took the position that the railways had "been unable to or intentionally failed to comply" with the settlement agreement so that it had been irreparably breached. The Community Board further contended that the settlement agreement "was never intended as an enduring document which would prevent the filing of a subsequent complaint" with the Agency.

[10] In response to these communications, the Agency sought and received further submissions concerning whether it could adjudicate the second complaint.

[11] The BNSF Railway Company wrote in its submission:

> In summary, it is the position of BNSF that the Agency does ***not*** have jurisdiction to deal with ***this*** noise and vibration complaint, in the circumstances that have occurred. This complaint was conclusively resolved by the parties on 10 December 2008. In the result, the complainants are barred, or prevented, from seeking to have the complaint reactivated and heard by the Agency. Moreover, the Agency is *functus officio*, or without jurisdiction, to deal with this complaint.

[12] This position was adopted by both the Canadian National Railway Company and the Canadian Pacific Railway Company. After receiving the submissions of the Community Board and the reply of the Railway Companies, the Agency rendered the decision now under appeal.

Applicable Legislation

[13] The parties agree that the initial complaint made by the Community Board fell within section 95.1 of the Act so that the Agency had jurisdiction to hear and determine the first complaint. Section 95.1 states:

95.1 When constructing or operating a railway, a railway company shall cause only such noise and vibration as is reasonable, taking into account	95.1 La compagnie de chemin de fer qui construit ou exploite un chemin de fer doit limiter les vibrations et le bruit produits à un niveau raisonnable, compte tenu des éléments suivants :
(*a*) its obligations under sections 113 and 114, if applicable;	*a*) les obligations qui lui incombent au titre des articles 113 et 114, le cas échéant;
(*b*) its operational requirements; and	*b*) ses besoins en matière d'exploitation;
(*c*) the area where the construction or operation takes place.	*c*) le lieu de construction ou d'exploitation du chemin de fer.

[14] Section 95.2 of the Act authorizes the Agency to create guidelines about how it will decide noise and vibration complaints and about the collaborative resolution of such complaints:

95.2 (1) The Agency shall issue, and publish in any manner that it considers appropriate, guidelines with respect to	95.2 (1) L'Office établit — et publie de la manière qu'il estime indiquée — des lignes directrices:
(*a*) the elements that the Agency will use to determine whether a railway company is complying with section 95.1; and	*a*) sur les éléments dont il tient compte pour décider si une compagnie de chemin de fer se conforme à l'article 95.1;
(*b*) the collaborative resolution of noise and vibration complaints relating to the construction or operation of railways.	*b*) sur des mesures de coopération en matière de résolution des conflits concernant le bruit ou les vibrations liés à la construction ou à l'exploitation de chemins de fer.
(2) The Agency must consult with interested parties, including municipal governments, before issuing any guidelines.	(2) Avant d'établir des lignes directrices, l'Office consulte les intéressés, notamment les administrations municipales.

(3) The guidelines are not statutory instruments within the meaning of the *Statutory Instruments Act*.	(3) Les lignes directrices ne sont pas des textes réglementaires au sens de la *Loi sur les textes réglementaires*.

[15] Section 95.3 of the Act sets out the process the Agency must follow when it receives a noise and vibration complaint.

95.3(1) On receipt of a complaint made by any person that a railway company is not complying with section 95.1, the Agency may order the railway company to undertake any changes in its railway construction or operation that the Agency considers reasonable to ensure compliance with that section.	95.3(1) Sur réception d'une plainte selon laquelle une compagnie de chemin de fer ne se conforme pas à l'article 95.1, l'Office peut ordonner à celle-ci de prendre les mesures qu'il estime raisonnables pour assurer qu'elle se conforme à cet article.
(2) If the Agency has published guidelines under paragraph 95.2(1)(*b*), it must first satisfy itself that the collaborative measures set out in the guidelines have been exhausted in respect of the noise or vibration complained of before it conducts any investigation or hearing in respect of the complaint. [emphasis added]	(2) S'il a publié des lignes directrices au titre de l'alinéa 95.2(1)*b*), l'Office ne peut procéder à l'examen de la plainte que s'il est convaincu que toutes les mesures de coopération prévues par celles-ci ont été appliquées. [Non souligné dans l'original.]

[16] As referenced above, the Agency exercised the authority given in subsection 95.2(1) to enact guidelines concerning noise and vibration complaints. The following excerpt from the Guidelines re-states the legislated requirement that before the Agency can proceed with an investigation the parties must exhaust the collaborative measures developed to deal with noise and vibration complaints:

> Collaborative Resolution of Noise and Vibration Complaints
>
> The CTA specifies that before the Agency can investigate a complaint regarding railway noise or vibrations, it must be satisfied that the collaborative measures set out in these guidelines have been exhausted.
>
> Collaboration allows both complainants and railway companies to have a say in resolving an issue. A solution in which both parties have had input is more likely to constitute a long-term solution and is one that can often be implemented more effectively and efficiently than a decision rendered through an adjudicative process.

[17] Section 36.1 of the Act deals with mediation. If the parties request mediation of a dispute within the Agency's jurisdiction, the Agency "shall" refer the dispute for mediation (subsection 36.1(1)). Mediation is to be confidential unless the parties otherwise agree (subsection 36.1(4).

[18] Mediation effectively suspends adjudication of the formal application before the Agency until the collaborative measures are complete:

36.1(6) The mediation has the effect of	36.1(6) La médiation a pour effet :
(*a*) staying for the period of the mediation any proceedings before the Agency in so far as they relate to a matter that is the subject of the mediation; and	*a*) de suspendre, jusqu'à ce qu'elle prenne fin, les procédures dans toute affaire dont l'Office est saisi, dans la mesure où elles touchent les questions faisant l'objet de la médiation;
(*b*) extending the time within which the Agency may make a decision or determination under this Act with regard to those proceedings by the period of the mediation.	*b*) de prolonger, d'une période équivalant à sa durée, le délai dont dispose l'Office pour rendre en vertu de la présente loi une décision à l'égard de ces procédures.

[19] A settlement agreement reached through mediation may be filed with the Agency, with the result that the agreement is enforceable "as if it were an order of the Agency" (subsection 36.1(7)).

An order of the Agency may be made an order of the Federal Court or any superior court and "is enforceable in the same manner as such an order" (subsection 33(1)).

Decision of the Agency

[20] The Agency began its analysis by finding that the Community Board was a party to both the first and second complaints and that the "contents of the two complaints are virtually identical." The Agency then framed the issue before it in the following terms:

> It is clear to the Agency that the two complaints are in fact, the same complaint involving the same parties, namely, the railway companies and QCB. Therefore the Agency finds that there is only one complaint before the Agency. The Agency must determine if it has jurisdiction to adjudicate this complaint.

The Agency did not treat the second complaint as a complaint that there had been a breach of the settlement agreement.

[21] The Agency went on to make the following findings:

1. The mediation process was complementary to, and not a replacement for, the adjudicative process.
2. Nothing in the Act suggested that the conclusion of a settlement agreement after mediation was intended to constitute an order of the Agency. Reliance was placed upon subsection 36.1(7) of the Act, which provides that filing an agreement reached as a result of mediation with the Agency makes the agreement "enforceable as if it were an order of the Agency."

3. Because a filed mediation agreement is not an order of the Agency, neither the principles of *issue estoppel* or *functus officio* applied.
4. The Disposition Statement is not akin to a consent judgment or order because it was not signed by a member of the Agency and did not state that it was intended to constitute an order of the Agency.
5. In the absence of a formal order or judgment of the Agency on consent or otherwise, "there is no basis upon which to assert that [the Agency] is barred from hearing this complaint on the basis of *issue estoppels*, or that the Agency is *functus officio*."

[22] The Agency concluded by stating it was satisfied the collaborative measures set out in the Guidelines had been exhausted so that the formal adjudicative process could proceed.

Standard of Review

[23] While the Agency framed the issue in terms of whether it had jurisdiction to adjudicate the complaint, properly understood the issue is not a true jurisdictional question. The parties agreed that the substance of the first complaint fell within the ambit of section 95.1 of the Act. The question before the Agency was whether the settlement agreement had the effect of precluding the Community Board from relitigating a complaint which it had previously compromised. This required the Agency to consider the legislative scheme and the terms of the settlement agreement.

[24] The Railway Companies argue that the standard of review to be applied is that of correctness. In their view, the issue before the Agency was a question of general law that was both

of central importance to the legal system as a whole and outside of the Agency's specialized area of expertise. The Agency, relying upon the decision of the Supreme Court of Canada in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, responded that the applicable standard of review is reasonableness.

[25] In my view, it is not necessary to determine the applicable standard of review. As explained below, even on application of the more deferential standard of review the decision of the Agency must be set aside.

Analysis

[26] During oral argument, counsel for the Agency conceded that if the parties had entered into a final and binding settlement agreement, the Agency would be required to acknowledge and respect the terms of a final settlement. However, counsel for the Agency argued that this was not the issue before the Agency in the present case. The issue before the Agency was whether it had jurisdiction to deal with the second complaint filed by the Community Board. In counsel's submission, the parties did not present the settlement agreement as a final and binding settlement agreement which could bar adjudication of the second complaint.

[27] In my view, counsel for the Agency was correct to concede that the Agency must respect the terms of any final settlement agreement concluded by the parties to a complaint before the Agency. This acknowledgment is consistent with the legislative scheme in which the Agency operates.

[28] As described above, the Act authorizes the Agency to publish guidelines with respect to the collaborative resolution of noise and vibration complaints. Where such guidelines have been published, the Agency cannot proceed to investigate or hear a complaint unless it is satisfied that those measures have been exhausted. Mediation, a form of collaborative resolution provided for in the Act, has the effect of staying proceedings before the Agency. A settlement agreement reached through mediation may be filed with the Agency and be enforced as if it were an order of the Agency.

[29] Read as a whole, these provisions reflect Parliament's intent that the collaborative and adjudicative procedures are alternate mechanisms for reaching the same result: the final resolution of a complaint. Both mechanisms result in a document that can be filed with the Federal Court or a superior court for enforcement. There is nothing in the legislative scheme to support the Agency's conclusion that the successful resolution of a complaint in whole or in part through collaborative measures does not replace the adjudicative process with respect to those issues which the parties have finally resolved.

[30] Where the parties have finally resolved a complaint in a settlement agreement, the practical effect of a decision of the Agency to ignore the settlement agreement and adjudicate issues previously resolved would be to denude the collaborative measures of any effect. No properly advised litigant would agree to enter mediation if the litigant understood that the time and resources devoted to reaching a mediated result would be wasted if the other side later regretted its bargain and simply decided that the mediated solution was no longer desirable.

[31] Turning to counsel's submission that in the present case the parties did not present the settlement agreement as a final and binding agreement that would bar adjudication of the second complaint, this submission is untenable in light of the written submissions the parties made to the Agency. As set out at some length above, the position of the Railway Companies throughout was that the settlement agreement was a final and binding agreement. The Community Board joined issue with the Railway Companies on this point, taking the position that the settlement agreement was not intended to be an "enduring document which would prevent the filing of a subsequent complaint."

[32] The Agency failed to consider and decide the central issue raised by the parties: what was the effect of the settlement agreement. Was it a final and binding settlement which barred the Community Board from litigating issues it had previously compromised? By failing to decide the central issue raised by the parties, the Agency's decision was unreasonable and so should be set aside.

Conclusion and Costs

[33] For these reasons, I would allow the appeal, set aside the decision of the Agency and return the matter to the Agency to determine whether the settlement agreement was intended to finally resolve the issues raised in the first complaint. If so, given the finding of the Agency that the two complaints are "virtually identical," the Community Board will be precluded from relitigating those issues before the Agency.

[34] Subsection 41(4) of the Act entitles the Agency to be heard on the argument of an appeal from one of its decisions on a question of law or jurisdiction. In the present case, the submissions of the Agency went beyond the scope of its jurisdiction. Counsel for the Agency argued the merits of the appeal and asserted the reasonableness of the Agency's decision. For that reason, it is appropriate that costs follow the event. I would order that the Agency pay one set of the costs of this appeal to the Railway Companies.

"Eleanor R. Dawson"
J.A.

"I agree
Marc Noël J.A."

"I agree
J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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