Federal Court of Appeal

Cour d'appel fédérale

Date: 20210813

Docket: A-297-20

Citation: 2021 FCA 167

Present: LOCKE J.A.

BETWEEN:

VANCOUVER FRASER PORT AUTHORITY

Appellant

and

GCT CANADA LIMITED PARTNERSHIP
and
THE ATTORNEY GENERAL OF CANADA

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on August 13, 2021.

REASONS FOR ORDER BY: LOCKE J.A.

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REASONS FOR ORDER

LOCKE J.A.

[1] The present appeal concerns a decision by Justice Michael Phelan of the Federal Court dated November 17, 2020 (2020 FC 1062) in the context of an application for judicial review (File No. T-538-19, the Application). Justice Phelan's decision dismissed an appeal from a

decision by Prothonotary Angela Furlanetto dated March 9, 2020 (2020 FC 348). The prothonotary's decision refused to strike the notice of application based on prematurity.

[2] The Application was commenced by the respondent GCT Canada Limited Partnership (GCT) on March 28, 2019. Progress of the Application to a hearing on the merits has been delayed by various interlocutory disputes, but a timetable was put in place on June 25, 2021 that would lead to a four-day hearing beginning October 18, 2021.

[3] The appellant, Vancouver Fraser Port Authority (VFPA), now moves for an Order staying the Application until final determination of the present appeal. VFPA also seeks the earliest available hearing date for the appeal.

[4] The Respondent the Attorney General of Canada does not oppose the motion, and argues that a stay would be "consistent with the objective of Rule 3 of the *Federal Courts Rules*[, S.O.R./98-106 (Rules),] for a just, expeditious and efficient determination of the proceeding." GCT opposes the motion for a stay.

[5] Paragraph 50(1)(*b*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, upon which VFPA relies, provides that "The Federal Court of Appeal … may, in its discretion, stay proceedings in any cause or matter … where for any other reason it is in the interest of justice that the proceedings be stayed." The parties agree that this Court has the power to stay proceedings in another court. This is supported by *Clayton v. Canada (Attorney General)*, 2018 FCA 1 at para. 24 (*Clayton*). *Clayton* at para. 24, and *Mylan Pharmaceuticals ULC v. Astrazeneca Canada, Inc.*,

2011 FCA 312 at para. 5 (cited with approval therein) also support the application of the three-part test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (*RJR-MacDonald*) to the present motion, which concerns proceedings in another court. This test requires that VFPA establish each of the following:

A. It raises a serious issue on appeal;

B. It will suffer irreparable harm if the requested stay is not granted; and

C. The balance of convenience favours granting the stay.

[6] The parties' respective submissions are directed to these requirements. All of them must be met in order to grant the stay: *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 112 at para. 14 (*Janssen*).

[7] GCT does not dispute that VFPA meets the serious issue requirement. I accept this.

[8] With regard to irreparable harm, VFPA argues that its appeal with regard to its effort to have the notice of application struck will be rendered nugatory if the stay is not granted. It explains that, despite having acted diligently in moving the appeal forward, and even though the present appeal is ready to be heard (a requisition for hearing was filed on May 16, 2021), the Court has advised that a date would not be set until the fall. VFPA cites *Re Charkaoui*, 2004 FCA 319 at paras. 8-10 (*Charkaoui*), in support of the argument that this Court has the power to stay a proceeding in another court where it would render the appeal unnecessary, futile or illusory. In addition, VFPA argues that the due administration of its administrative regime would be harmed if the appeal were rendered illusory.

[9] GCT argues that VFPA does not meet the irreparable harm requirement as described in *Janssen* at para. 24: "…the moving party must demonstrate in a detailed and concrete way that it will suffer real, definite, unavoidable harm – not hypothetical and speculative harm – that cannot be repaired later." GCT argues that the *Charkaoui* decision cited by VFPA supports the Court's jurisdiction to issue a stay, but does not support a finding of irreparable harm. GCT argues that VFPA does not stand to suffer any harm that is not compensable in costs. GCT notes that VFPA will be able to argue that the Application is premature (just as it seeks to do in the present appeal) when it is heard on the merits before the Federal Court.

[10] I agree with GCT in this regard. Moreover, a decision by the Federal Court on prematurity could be appealed in due course to this Court. In its reply submissions, VFPA argues that, without the stay, it will suffer irreparable harm by virtue of being required to argue the merits of the very issue that it says is premature. While this might represent a prejudice, I am not convinced that it is irreparable.

[11] Having reached the conclusion that VFPA has not established that it will suffer irreparable harm if the stay is not granted, it is unnecessary for me to address the third requirement from *RJR-MacDonald*: the balance of convenience.

[12] I conclude that test in *RJR-MacDonald* is not met, and that the stay should not be granted.

[13] I am also not convinced that a stay would be in the interest of justice. I recognize that VFPA had reason to believe that the present appeal could be heard prior to the Application, at

least until the timetable for the Application was put in place on June 25, 2021. I also recognize that VFPA has acted with reasonable diligence in moving the appeal forward. However, it appears that VFPA expressed no concern until July 15, 2021 that the appeal should be heard before the Application, even when the timetable for the Application was put in place. The delay from June 25 to July 15 is not long, but it has increased importance in view of the short time until the scheduled hearing of the Application. Though VFPA indicates that it made inquiries with the Court on June 22 and 30, 2021 about the setting of a date for the hearing of the appeal, there is no suggestion that it requested an expedited hearing date at that time. Instead, VFPA moved to stay the Application. We are now several weeks closer to the hearing of the Application. It is now a much greater challenge to hear and decide the appeal before the Application.

[14] In any case, there appears to be no opposition to VFPA's request that the appeal be set down for hearing at the earliest available date. The Court will attempt to accommodate that request.

"George R. Locke"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-297-20
STYLE OF CAUSE:	VANCOUVER FRASER PORT AUTHORITY v. GCT CANADA LIMITED PARTNERSHIP AND, THE ATTORNEY GENERAL OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	LOCKE J.A.
DATED:	AUGUST 13, 2021

WRITTEN REPRESENTATIONS BY:

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