Federal Court of Appeal  Cour d'appel fédérale

Date: 20201002

Docket: A-102-20

Citation: 2020 FCA 155

Present: **WEBB J.A.**

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 2, 2020.

REASONS FOR ORDER BY: WEBB J.A.

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REASONS FOR ORDER

WEBB J.A.

[1] The Canadian Transportation Agency (CTA) has brought a motion to strike the judicial review application filed by Air Passenger Rights (APR). The judicial review application relates to two statements that were published on the website of the CTA that were prompted by the COVID-19 pandemic. The "Statement on Vouchers" addresses the situation arising when flights are cancelled. It includes the following:

> [w]hile any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).

[2] The second statement that is the subject of the judicial review application is one which references the Statement on Vouchers.

[3] Following the filing of its application for judicial review, APR brought a motion seeking an interlocutory order that would require the removal of the statements from the CTA's website. It was also seeking "to enjoin the members of the CTA from dealing with passenger complaints with respect to refunds on the basis that a reasonable apprehension of bias exists on their part as a result of the [CTA]'s public statements" (*Air Passenger Rights v. Canadian Transportation Agency*, 2020 FCA 92, at para. 3).

[4] In dismissing the motion, Justice Mactavish applied the test for interlocutory injunctive relief as set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385.

[5] In paragraph 16 of the reasons related to the dismissal of this motion, Justice Mactavish noted that there is a low threshold for establishing the existence of a serious issue to be tried. In paragraph 17 she stated:

> With this low threshold in mind, I will assume that APR has satisfied the serious issue component of the injunctive test to the extent that it seeks to enjoin members of the CTA from dealing with passenger complaints on the basis that a reasonable

> apprehension of bias exists on their part. However, as will be explained further on in these reasons, I am not persuaded that APR has satisfied the irreparable harm component of the injunctive test in this regard.

[6] Justice Mactavish also noted that a higher threshold is involved when a person is seeking a mandatory interlocutory injunction to compel another person to take action prior to the determination of the underlying application on its merits. In that case, she found that the party who is seeking an injunction would need to establish a strong *prima facie* case (paragraph 19).

[7] In addressing whether APR had established a strong *prima facie* case, Justice Mactavish stated:

> 22 Not every administrative action gives rise to a right to judicial review. No right of review arises where the conduct in issue does not affect rights, impose legal obligations, or cause prejudicial effects: *Democracy Watch v. Canada (Attorney General)*, 2020 FCA 69, [2020] F.C.J. No. 498 at para. 19. See also *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 F.C.R. No. 3, leave to appeal to SCC refused 38379 (2 May 2019); *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15, 86 Admin. L.R. (4th) 149.
>
> 23 For example, information bulletins and non-binding opinions contained in advance tax rulings have been found not to affect rights, impose legal obligations, or cause prejudicial effects: see, for example, *Air Canada v. Toronto Port Authority at al.*, 2011 FCA 347, 426 N.R. 131; *Rothmans, Benson & Hedges Inc. v. Minister of National Revenue*, [1998] 2 C.T.C. 176, 148 F.T.R. 3. It is noteworthy that in its Notice of Application, APR itself states the CTA's statements "purport [t]o provide an unsolicited advance ruling" as to how the CTA will deal with passenger complaints about refunds for pandemic-related flight cancellations.

[8] In paragraph 27 of her reasons, Justice Mactavish concluded:

> 27 It thus cannot be said that the impugned statements affect rights, impose legal obligations, or cause prejudicial effects on either APR or airline passengers. While this finding is sufficient to dispose of APR's motion for mandatory relief, as will be explained below, I am also not persuaded that it has satisfied the irreparable harm component of the test.

[9] As a result, APR had failed to establish, with respect to its request for mandatory relief that the statements be removed from the CTA's website, that these statements "affect rights, impose legal obligations, or cause prejudicial effects on either APR or airline passengers".

[10] Following this finding, Justice Mactavish noted:

> 39 Because it says that APR's application for judicial review does not relate to a matter that is amenable to judicial review, the CTA argues in its memorandum of fact and law that the application should be dismissed. There is, however, no motion currently before this Court seeking such relief, and any such motion would, in any event, have to be decided by a panel of judges, rather than a single judge. Consequently, I decline to make the order sought.

[11] Prompted by this notation that there was no motion before the Court to dismiss the application for judicial review, the CTA brought the current motion to strike this application.

[12] In *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, (*JP Morgan*) this Court noted that the threshold for striking an application for judicial review is high:

> 47 The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success" [footnote omitted]: *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.), at page 600. There must be a "show stopper" or a "knockout punch" — an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117, at

> paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286, at paragraph 6; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.
>
> 48 There are two justifications for such a high threshold. First, the Federal Courts' jurisdiction to strike a notice of application is founded not in the rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes: *David Bull*, above, at page 600; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 18 C.C.L.I. (5th) 263. Second, applications for judicial review must be brought quickly and must proceed "without delay" and "in a summary way": *Federal Courts Act*, above, subsection 18.1(2) and section 18.4. An unmeritorious motion — one that raises matters that should be advanced at the hearing on the merits — frustrates that objective.

[13] APR's main argument in its memorandum filed in relation to this motion is that the test for the availability of judicial review has changed. APR submits that the test based on whether the conduct of the administrative body affects legal rights, imposes legal obligations, or causes prejudicial effects is no longer applicable. Therefore, APR submits that Justice Mactavish erred in basing her decision on her finding that the impugned statements did not affect legal rights, impose legal obligations, or cause prejudicial effects.

[14] APR notes that this Court in *Air Canada v. Toronto Port Authority*, 2011 FCA 347, (*AC v. TPA*) stated:

> 28 The jurisprudence recognizes many situations where, by its nature or substance, an administrative body's conduct does not trigger rights to bring a judicial review.
>
> 29 One such situation is where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488; *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15, 86 Admin. L.R. (4th) 149.

[15] However, APR, in paragraph 49 of its memorandum, submits that the Supreme Court of Canada changed the test that is to be applied to determine if judicial review is available:

> [i]n 2018, in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018 SCC 26] the Supreme Court recast the test for availability of judicial review as simply whether the administrative bodies' action is an exercise of state authority that is of a sufficiently public character [***Wall*-test**].
>
> (emphasis in original)

[16] Although APR does not explicitly state that, in its view, the Supreme Court indirectly overturned the decision of this Court in *AC v. TPA*, it appears that this is implicit in its argument which culminates in the following statement in paragraph 63 of its memorandum:

> Therefore, the panels of this Honourable Court in *Oceanex* [*Oceanex Inc. v. Canada (Transport)*, 2019 FCA 250] and *Guérin* [*Guérin c. Canada (Procureur général)*, 2019 CAF 272] correctly concluded that availability of judicial review of acts of federal administrative bodies is to be determined based on the *Wall*-test.

[17] The position of the CTA is that the principle, as set out in *AC v. TPA*, that there is no right to judicial review "where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects" is still good law and it has not been overturned by the Supreme Court. Therefore, since the statements at issue in this judicial review application do not affect legal rights, impose legal obligations or cause prejudicial effects, the application for judicial review should be struck.

[18] It is important to examine exactly what each court said. The relevant paragraph in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 (*Wall*), is paragraph 14:

> Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature – such as renting premises and hiring staff – and such decisions are not subject to judicial review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at para. 52. In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament", but is rather exercising a private power (ibid.). Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.

[19] There is nothing in this paragraph that indicates that the Supreme Court is overturning the decision of this Court in *AC v. TPA*. Rather, the Supreme Court specifically refers to this decision in the above quoted paragraph, albeit for a different principle referenced in that case. If the Supreme Court had intended that *AC v. TPA* should no longer be followed for the principle that judicial review will not be available if the conduct does not affect legal rights, impose legal obligations or cause prejudicial effects, it presumably would have explicitly stated it was overturning this decision.

[20] Furthermore, it is important to review the context in which this statement was made by the Supreme Court. The issue in *Wall*, was described by the Supreme Court in the first paragraph of that decision:

> 1. The central question in this appeal is when, if ever, courts have jurisdiction to review the decisions of religious organizations where there are concerns about procedural fairness. In 2014, the appellant, the Judicial Committee

> of the Highwood Congregation of Jehovah's Witnesses, disfellowshipped the respondent, Randy Wall, after he admitted that he had engaged in sinful behaviour and was considered to be insufficiently repentant. The Judicial Committee's decision was confirmed by an Appeal Committee. Mr. Wall brought an originating application for judicial review of the decision to disfellowship him before the Alberta Court of Queen's Bench. The court first dealt with the issue of whether it had jurisdiction to decide the matter. Both the chambers judge and a majority of the Court of Appeal concluded that the courts had jurisdiction and could proceed to consider the merits of Mr. Wall's application.

[21] The issue was, therefore, whether the decision that had been reached by the Judicial Committee could be the subject of a judicial review. The conclusion of the Supreme Court was that this decision was not justiciable. The Supreme Court did not decide that a particular conduct which did not affect legal rights, impose legal obligations or cause prejudicial effects, could nevertheless be subject to judicial review. In *Wall*, Mr. Wall had been disfellowshipped by the Judicial Committee and therefore his rights were affected.

[22] APR submitted that two decisions of this Court applied the test as set out in *Wall*. In *Oceanex Inc. v. Canada (Transport)*, 2019 FCA 250, this Court simply noted that the Supreme Court had recently revisited the law governing the availability of judicial review and that it had emphasized:

> […] that judicial review is available only where two conditions are met – "where there is an exercise of state authority and where that exercise is of a sufficiently public character" […]
>
> (emphasis in original)

[23] This Court did not decide that judicial review would be available where these two conditions are met regardless of whether the particular decision or conduct affects legal rights, imposes legal obligations or causes prejudicial effects.

[24] In *Guérin c. Canada (Procureur général)*, 2019 CAF 272, the reference to the Supreme Court's decision in *Wall*, is in paragraph 65: « Ce principe a récemment été réitéré par la Cour suprême dans *Highwood Congregation of Jehovah's Witnesses* (*Judicial Committee*) *c. Wall* […] ». The principle to which this Court was referring was stated in the immediately preceding paragraph: « Dans l'arrêt *Dunsmuir*, la Cour suprême a clairement réaffirmé le principe selon lequel la relation de la Couronne avec ses employés est régie par le droit des contrats. » The principle to which this Court was referring was not the principle that related to the availability of judicial review but rather that the relationship between the Crown and its employees is governed by the law of contract.

[25] As a result, none of these cases support the proposition advanced by APR. APR also refers to the decision of this Court in *Wenham v. Canada (Attorney General)*, 2018 FCA 199. In that case, this Court noted:

> 36 An application can be doomed to fail at any of the three stages:
>
> I. Preliminary objections. An application not authorized under the *Federal Courts Act*, R.S.C., 1985, c. F-7 or not aimed at public law matters may be quashed at the outset: *JP Morgan* at para. 68; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26; *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605.

[26] This Court referred to both the Supreme Court's decision in *Wall* and the decision of this Court in *AC v. TPA* as providing a basis on which a judicial review application could fail. Therefore, an application for judicial review could fail if the test as set out in *Wall* is not satisfied, or if the particular decision or conduct did not affect legal rights, impose legal obligations or cause prejudicial effects.

[27] As a result, there is no support for the proposition as advocated by APR that "where there is an exercise of state authority and where that exercise is of a sufficiently public character" that exercise of public authority can be subject to judicial review even though no legal rights are affected, no legal obligations are imposed and there are no prejudicial effects.

[28] However, the finding by Justice Mactavish that the impugned statements did not affect legal rights, impose legal obligations or cause prejudicial effects were made in relation to the part of the judicial review application with respect to the request for an order compelling the CTA to remove these statements from its website.

[29] As noted above, Justice Mactavish stated that she was assuming "that APR has satisfied the serious issue component of the injunctive test to the extent that it seeks to enjoin members of the CTA from dealing with passenger complaints on the basis that a reasonable apprehension of bias exists on their part". APR lost its motion for an interlocutory injunction in relation to this aspect at the irreparable harm stage, not the serious issue to be tried stage. CTA did not address this distinction in its memorandum of fact and law that it included with its motion record.

Instead, the CTA only focused on Justice Mactavish's conclusion that the impugned statements did not affect legal rights, impose legal obligations or cause prejudicial effects.

[30] Following the receipt of APR's motion record, CTA addressed the reasonable apprehension of bias argument in its reply submissions, which were longer than its original submissions.

[31] CTA, in its reply submissions, stated:

> 13. [APR] wants this Court to review facts which [APR] says create a reasonable apprehension of bias in future cases. There is no precedent for this. The proper course is to raise the issue in those cases where the decision of the [CTA] would affect the legal rights of the parties.
>
> 14. The decision of Mactavish J.A. on the motion for an interlocutory injunction brings home this very point. Mactavish J.A. pointed out that allegations of bias could be raised in actual proceedings affecting the rights of individuals, as was done in *E.A. Manning* [*E.A. Manning Ltd. v. Ontario Securities Commission*, 18 O.R. (3d) 97, [1994] O.J. No. 1026];
>
> > "Even if it subsequently turns out that CTA members were in fact involved in the formulation of the statements, APR's argument could be advanced in the context of an actual passenger complaint and any bias concerns could be addressed in that context. Relief could then be sought in this Court if the complainant is not persuaded that they have received a fair hearing."

[32] However, these comments of Justice Mactavish were made in paragraph 36 of her reasons in relation to the irreparable harm component of the *RJR-MacDonald* test, not whether there was a serious issue that was raised in the judicial review application in relation to this matter. The absence of a precedent should not also necessarily lead to the conclusion that an application for judicial review should be struck. CTA was also unable to identify any precedent

that clearly supported its position that this part of the judicial review application was “so clearly improper as to be bereft of any possibility of success” (*David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588, at page 600 (C.A.), 58 C.P.R. (3d) 209).

[33] The arguments related to the reasonable apprehension of bias should be made at the hearing of the judicial review application, not in reply submissions in relation to a motion to strike the judicial review application. APR should not be deprived of its argument simply because there is no precedent.

[34] As a result, I would dismiss the motion to strike the application for judicial review. The costs of this motion shall be in the cause.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	AIR PASSENGER RIGHTS v. CANADIAN TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	WEBB J.A.
DATED:	OCTOBER 2, 2020

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