Federal Court Cour fédérale

Date: 20150227

Docket: T-2211-14

Citation: 2015 FC 252

Vancouver, British Columbia, February 27, 2015

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

0769449 B.C. LTD.
DBA KIMBERLY TRANSPORT

Applicant

and

VANCOUVER FRASER PORT AUTHORITY

Respondent

JUDGMENT AND REASONS

[1] The applicant [Kimberly Transport] commenced this application asking the court to issue an order in the nature of mandamus requiring the respondent [the Port Authority] to issue its decision terminating Kimberly Transport's trucking license in a "final, signed form which identifies the decision maker" or, in the alternative, an order extending the time for filing an application for judicial review of the decision.

Background

[2] The Port Authority, established pursuant to the *Canada Marine Act*, SC 1998, c 10, has jurisdiction over and licences trucking companies permitting them to enter the port and pick up or drop off containers [TLS license agreements]. Kimberley Transport had a TLS license issued by the Port Authority.

[3] By email letter dated June 25, 2014, the Port Authority, alleging breaches of the licence agreement, advised Kimberly Transport that its licence was suspended immediately and, subject to the possibility of reconsideration, it would be terminated on July 10, 2014 [the Suspension Decision]. This prompted an exchange of correspondence regarding the alleged breaches. The Port Authority asked that all correspondence be directed to its outside counsel. The exchange ultimately led to the Port Authority issuing an email letter dated August 22, 2014, stating that "effective immediately upon delivery of this decision … the Licence is terminated" [the Termination Decision].

[4] Both the Suspension Decision and the Termination Decision were signed off as follows and with no name of the decision-maker provided:

> VANCOUVER FRASER PORT AUTHORITY
>
> TLS Administrator

[5] Receipt of the Termination Decision prompted Kimberly Transport to email the Port Authority directly again responding to the alleged breaches and noting: "we have no idea who was responsible for reviewing the cancelation [sic] of our TLS license." This prompted legal

counsel for the Port Authority to write to legal counsel for Kimberly Transport reminding him that all correspondence was to be directed to him and not his client. Legal counsel for Kimberly Transport responded on August 26, 2014, advising that he remained counsel for Kimberly Transport and the response to its email should be directed to him.

[6] Counsel for the Port Authority responded by letter dated September 15, 2014, stating that Kimberly Transport's email was received after the deadline specified in earlier correspondence, that the Port Authority would not reconsider its earlier decision, and that the decision of August 22, 2014, was final.

[7] Kimberly Transport then retained its current counsel who wrote to counsel for the Port Authority on September 24, 2014, advising of the retainer, and challenging the validity of the purported decision of August 22, 2014, because the identity of the decision-maker was not disclosed. Counsel wrote:

> We note that this decision is not signed and has not identified the decision-maker. We therefore consider it to be defective as a decision of Port Metro Vancouver under its relevant legislation. Clearly, the party affected by a decision is entitled to know the identity of the decision-maker in order that it can be determined whether the decision was properly made.
>
> Upon receipt of a proper decision, our instructions are to seek a juridical review of the decision if it is in the form of the August 22, 2014, letter. We look forward to hearing from you with the identity of the decision-maker by close of business on October 30, 2014.
>
> If we do not hear from you by that time, we will commence a judicial review, seeking, *inter alia*, that the purported decision of August 22, 2014, is defective.

[8] Counsel for the Port Authority responded by email of October 28, 2014. He did not disclose the identity of the decision-maker; rather he took the position that there were no "binding (or even persuasive) authorities that impose any requirements beyond the applicable legislation and license agreement." He went on to note that the time for seeking judicial review had already expired (by 2 days) when the correspondence dated September 24, 2014, was sent by Kimberly Transport's new counsel. Given this lateness, the motive in writing the letter of September 24, 2014, was questioned:

> This appears to be an attempt to have the original decision "re-issued" to somehow try to reset the clock to permit a judicial review to be filed in time. If so, we do not believe a court would condone such a tactic.

[9] This application for judicial review was filed October 24, 2014, seeking review of the Termination Decision, and the following relief:

> 1. An Order in the nature of mandamus requiring [the Port Authority] to issue the above decision in a final, signed form which identifies the decision-maker;
>
> 2. In the alternative, an Order extending the time by which an application for judicial review in respect of the decision may be brought pursuant to Section 18.1(2) of the *Federal Courts Act*, and granting leave to the Applicant to file a Notice of Application in the form attached to this Notice of Application as Appendix "A";
>
> 3. The Applicant's costs of this application.

[10] Kimberly Transport filed an affidavit of a legal assistant attaching for the record the Termination Decision and some of the other relevant documentation. It filed no affidavit explaining the reason for the delay in seeking juridical review of the Termination Decision.

[11] The Port Authority also filed affidavit evidence, including an affidavit of an employee dated November 28, 2014, in which she swears that the decision to terminate the license was made by Mr. Greg Rogge, Director, Land Operations, of the Port Authority.

Issues

[12] Kimberly Transport and the Port Authority characterize the issues in this application differently. In my view, the issues to be determined may be resolved by addressing the following questions:

1. What is the relevance and effect, if any, of the failure of the Port Authority to identify the decision-maker in the Termination Decision?

2. If the application is not timely, should the court extend the time under the Rules for bringing this application which the Port Authority says was filed after the 30 day period permitted by subsection 18.1(2) of the *Federal Courts Act*?

3. If the court extends the time for filing this application or if the application is otherwise timely, and if the applicant is successful on the application, what relief should be ordered?

Analysis

1. Naming the Decision-Maker

[13] Kimberly Transport relies on this court's decision in *Wah Shing Television Ltd. and Partners v Canadian Radio-television and Telecommunications Commission*, [1984] FCJ No 161

(TD) [*Wah Shing*] for the proposition that "the duty of fairness requires that the parties be told which members of a tribunal participated in making a decision."

[14] The applicant in *Wah Shing* had been involved in CRTC licensing hearings. The applicant made no suggestion that it had been denied natural justice in the process leading up to the licensing decisions; however it brought an application for mandamus when the CRTC refused to name the commissioners who participated in the decisions, and whether each of them joined in or dissented from the decision reached. The applicant submitted that this denial was a denial of natural justice which the court could correct by mandamus.

[15] Justice Strayer agreed. He held that "where there is a legal duty to provide a fair hearing, it is a corollary of that duty that the interested parties be able to ascertain which members of the tribunal have participated in making such a decision affecting them." The rationale for this duty was said to be that absent disclosure of the names of the decision-makers, "they are effectively denied rights which they may otherwise have to attack this decision, e.g., for bias, real or apprehended…." I would add that failure to name the decision-maker also prevents an affected party from determining whether the decision-maker had the authority to make the impugned decision.

[16] Ultimately, Justice Strayer concluded that "it is therefore open to the Court to issue mandamus to require the disclosure of the names of the members … participating in licensing decisions" and he so ordered.

[17] The Port Authority submits that there is no obligation on it to name the person who made the Termination Decision. It points to and relies upon three decisions: *Wihksne v Canada (Attorney General)*, [2000] FCJ No 1178 (TD) [*Wihksne*]; *Gramaglia v Canada (Attorney General)*, [1998] FCJ No 1384 (TD) [*Gramaglia*]; and *Gosselin v Halifax (Regional Municipality) Taxi Committee*, [2000] NSJ No 31 [*Gosselin*].

[18] None of these authorities assist in the present circumstances. An examination of the court's record in *Wihksne* indicates that the reasons and decision of the tribunal were not signed by the three members but the reasons stated in an opening paragraph the names of the three decision-makers. That decision therefore turned on an argument that the decision was flawed because it was not signed by the decision-makers and not, as here, because the identity of the decision-makers were unknown. *Gramaglia* is a similar case. There, the tribunal provided the applicant with two documents: a decision letter stating that the appeal was dismissed for reasons attached and which stated the names of the three decision-makers and was signed by them, and attached were written reasons that were unsigned. Again, it was alleged that the decision was flawed because the reasons were not signed by the decision-makers, and not as here because the identity of the decision-makers were unknown.

[19] In *Gosselin*, the Nova Scotia Supreme Court was asked to quash a decision of the Taxi and Limousine Commission, in part because the Commission's decision upholding the Inspector's decision was not signed by the members. The Court rejected the submission that this failure constituted a breach of natural justice because the decision was unanimous and the applicant, having sat through the hearing and heard the decision, knew the identity of the

decision-makers. Of note, however, the court endorsed the views of Justice Strayer in *Wah Shing* at para 15 of its reasons:

> Natural justice requires that a person affected by a tribunal's decision should know the persons who have made the decision and should be aware of the reasons behind a decision that affects their rights.

[20] There is no suggestion that the Port Authority in terminating Kimberly Transport's TLS licenses had no legal duty to provide a fair hearing. Therefore, as in *Wah Shing*, I find that Kimberly Transport was entitled to know who made the Termination Decision. There is no evidence before me that it could have known that name unless the Port Authority provided it. The description provided at the end of the Termination Decision - "TLS Administrator" - is a unique position or is one which Kimberly Transport would know, without question, referred to Mr. Rogge.

[21] Accordingly, the court finds that when this application was filed, Kimberly Transport would have been entitled to the relief sought; namely an order in the nature of mandamus directing the Port Authority to identify the decision-maker.

2. *Timeliness*

[22] The Termination Decision was rendered on August 22, 2014. On September 24, 2014, some 32 days later, Kimberly Transport, through counsel, asked the Port Authority to disclose the name of the decision-maker. As discussed above, I find that the Port Authority had a duty to provide that name. The Port Authority neglected to perform that duty necessitating that Kimberly Transport seek an order for mandamus, which it did on October 24, 2014.

[23] The Port Authority submits that the 30 day period within which to commence this application began on August 22, 2014, with the issuance of the Termination Decision. It is not obvious to me that is the correct starting point for the limitation period.

[24] There was a request made on September 24, 2014 to the Port Authority to perform its legal duty within a reasonable time; namely, to disclose the name of the decision-maker. This court has held that neglect to perform a duty or unreasonable delay in performing the duty may be deemed an implied refusal to perform the duty. See *Mersad v Canada (Minister of Employment and Immigration)*, 2014 FC 543 at para 15 and the cases cited therein. This application for mandamus sought an order compelling the Port Authority to do its duty. The decision underlying the application then appears to be the implied refusal by the Port Authority which occurred on or after September 24, 2014. This application was filed within the 30 day period following that refusal, as required by subsection 18.1(2) of the *Federal Courts Act* and if that is the relevant date, then no extension of time is required.

[25] If the 30 day period does commence on August 22, 2014, as the Port authority submits, I would grant Kimberly Transport an extension of time to file this application for judicial review in the nature of mandamus. The Port Authority submits that Kimberly Transport fails to meet the requirements set out by the Federal Court of Appeal in *Grewal v Canada (Minister of Employment and Immigration)*, [1985] 2 FC 263 and *Canadian Grain Commission v Canada*, 2006 FCA 180, namely, that there be a continuing intention to bring the application, there be little or no prejudice to the parties opposite, there are reasons provided for the delay, the application has merit, and any other factors particular to the case. The Port Authority correctly

notes that there is no affidavit evidence from Kimberly Transport stating the reasons for the delay in bringing this application. However, on the facts before me, this is not fatal to the request for an extension of time.

[26] As the Federal Court of Appeal noted in the two authorities referenced above, the underlying consideration is to ensure that justice is done between the parties. There is no conjunctive test to be applied; rather the factors the court outlined are to be considered and weighed by the motion judge. I am satisfied on the record before me that Kimberly Transport had a continuing desire to learn the name of the decision-maker. I am also satisfied that there is no prejudice to the Port Authority if the extension is granted, and none was suggested by it. We do not know the reason for the delay and that weighs against an extension being granted. On the other hand, the application for mandamus when filed, and up until the Port Authority finally provided the name of the decision-maker on November 28, 2014, had considerable merit. In addition to those factors, I consider it very relevant that the Port Authority was put on notice that it had a duty to provide the name of the decision-maker and it failed to comply for more than two months. In fact, it failed to comply until after this litigation was commenced.

[27] The draft application for judicial review of the termination decision that Kimberly Transport attached to this application alleges that there was a "confrontation" between its principal and Mr. Greg Rogge in the months prior to him making the Termination Decision. Kimberly Transport informed the court at the hearing of this matter that now knowing who made the decision, it will be raising an allegation of bias or an appearance of bias and it was suggested

that the confrontation was the reason why the name of the decision-maker was not disclosed immediately.

[28] In my view, paramount consideration in this case should be given to the conduct of the Port Authority in withholding the decision-maker's name, the lack of prejudice to it, and that Kimberly Transport in the judicial review application on the merits of the decision appears to wish to advance an argument going to procedural fairness, namely, reasonable apprehension of bias given the identity of the decision-maker and his relationship with Kimberly Transport management in the weeks preceding the decision.

[29] For these reasons, I will order that this application for judicial review is timely.

Relief

[30] Having found this to be a timely application, I now turn to the merits of the application.

[31] Kimberly Transport submits that at the time this application was filed and up to November 28, 2014, mandamus would have issued, as it did in *Wah Shing* to order the decision-maker's name disclosed. The Port Authority submits that it would not have issued as the eight-part test recently enunciated in *CUPE, Air Canada Component v Canada (Minister of Labour)*, 2012 FC 1484 had not been met. In my assessment the *CUPE* test was met prior to November 28, 2014.

[32] The Port Authority had a legal duty to act by providing the decision-maker's name and that duty was owed to Kimberly Transport. I also find that at that date there was a clear right to the performance of the duty and had been since the Termination Decision was rendered. In particular, Kimberly Transport had made a request for the identity of the decision-maker and provided a reasonable time for the name to be provided, and there was a subsequent implied refusal to supply it. The duty to provide the name was not discretionary, and given the continued refusal to provide the name up to the date of application, no other adequate remedy was available to Kimberly Transport. Clearly, up to November 28, 2014, the order would have been of practical effect, no other remedy would have been available, and the balance of convenience rested with Kimberly Transport.

[33] However, all that changed on November 28, 2014, when the Port Authority, at long last, disclosed the name of the decision-maker in an affidavit filed in this proceeding.

[34] Kimberly Transport acknowledges that mandamus is no longer an appropriate remedy. It submits that it ought to be granted an extension of time to file the Notice of Application for judicial review of the Termination Decision on the merits. It further says that given the disclosure of the decision-maker, it will be amending the draft application filed as an Appendix to this application to raise issues relating to a reasonable apprehension of bias.

[35] The Port Authority submits that such an application could have been filed by Kimberly Transport on or after November 28, 2014, and there is no explanation why it has delayed in so doing. Again, I agree that no such explanation has been provided and that weighs against the

relief of an extension of time; however, the delay has been brief, this application was already before the court and was being opposed by the Port Authority, there would have been every reason to believe that the Port Authority would likewise oppose an extension of time had Kimberly Transport abandoned this application and filed a new application with a request for an extension of time. In other words, in all likelihood, the parties and the court would be in the same position we are in today.

[36] I can not help but note that the present situation and all of the challenges arise from the fact that the Port Authority chose not to identify the decision-maker on the Termination Decision. In my view, paramount consideration in this case should be given to the conduct of the Port Authority in withholding the decision-maker's name, the lack of prejudice to it, that Kimberly Transport has maintained an intention to challenge the Termination Decision, and that the judicial review application, on the incomplete record here appears to have merit.

[37] In my assessment, the appropriate remedy is to extend the time for Kimberly Transport to file an application to judicially review the merits of the Termination Decision rendered by Mr. Greg Rogge on August 22, 2014. In the circumstances, only a short extension will be granted. This new application, once filed, should be case managed to ensure that it reaches a hearing date as soon as possible. The applicant is to inform the court on filing of its application that in this decision it was stated that it is to be transmitted to the Office of the Chief Justice for the appointment of a case management judge or prothonotary.

[38] The applicant informed the court that if successful it was seeking an order of costs, all in, in the amount of $3500. I accept that as reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is timely and is allowed; the applicant is granted an extension of time of one week from the date hereof in which to file an application for judicial review of the decision dated August 22, 2014, made by Greg Rogge, Director, Land Operations of the Port Authority, terminating the applicant's TSL license; and the applicant is entitled to its costs fixed at $3500, all in.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2211-14
STYLE OF CAUSE:	0769449 B.C. LTD. DBA KIMBERLY TRANSPORT v VANCOUVER FRASER PORT AUTHORITY
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	FEBRUARY 16, 2015
JUDGMENT AND REASONS:	ZINN J.
DATED:	FEBRUARY 27, 2015

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