Federal Court  Cour fédérale

Date: 20181023

Docket: T-1718-16

Citation: 2018 FC 1060

Ottawa, Ontario, October 23, 2018

PRESENT: Madam Prothonotary Mireille Tabib

BETWEEN:

SHAWN KINGHORNE

Applicant

And

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] The Attorney General of Canada brings the present motion, seeking to be removed as respondent in this judicial review application, pursuant to Rule 303(3) of the *Federal Courts Rules* SRO/98-106. Alternatively, the Attorney General requests that the Grand Manan Harbour Authority – the decision-maker in respect of the decision under review – be joined as a party pursuant to Rule 104(1)(b) of the *Federal Courts Rules*.

[2] For the reasons that follow, the Attorney General's motion will be dismissed.

I. The Context

[3] The GMHA is a private, not-for-profit corporation to which the Minister of Fisheries and Oceans has delegated the authority to manage, operate and maintain, by way of a lease agreement, several harbours on Grand Manan Island, pursuant to the *Fishing and Recreational Harbours Regulations* SOR/78-767. One of the requirements of the lease and of the delegated authority is for the GMHA to ensure access by the public to the harbours without discrimination. The GMHA however does have the authority to deny access to a harbour where it would render the use of the harbour unsafe or would impede, interfere or render difficult or dangerous the use of the harbour. The GMHA has authority to make its own policies in managing the harbours under its care.

[4] White Head Cove is one of the harbours under the GMHA's management; it is also much favoured by lobster fishermen as a point from which to start fishing on "Setting Day", the first day of the lobster season for the local area. Beginning in 2015, citing excessive demand for its berthing facilities and safety concerns for its regular users, the GMHA adopted a policy whereby "only White Head vessels that home port from White Head 12 months of the year will be given permission to start from White Head harbour" on Setting Day.

[5] The applicant, Shawn Kinghorne, was not recognized as a fisher or vessel owner whose normal home port is White Head, and was thus denied access to the harbour on Setting Day in 2015, and again in 2016. He has brought the present application to review the GMHA's 2016 decision denying him access to White Head harbour at the commencement of the 2016 lobster

season. The principal issues that arise on the merits of the application are whether the Applicant was denied procedural fairness in the decisional process, and whether the GMHA misinterpreted or misapplied its policy when it determined that the Applicant did not make White Head his home port 12 months of the year.

II. Procedural History

[6] The Applicant commenced this application, initially naming the GMHA as respondent. The GMHA responded and filed the Certified Tribunal Record and its affidavits within the delays contemplated by the Federal Courts Rules, but soon thereafter expressed to the Applicant its concerns that, as the decision-maker, it should not have been named as respondent.

[7] The Applicant made an *ex parte* motion seeking directions as to which entity to serve. The Court declined to make a determination on the record before it, directing the GMHA to make a motion if it felt it was improperly named. That motion was eventually brought, the GMHA seeking an order directing the Applicant to amend his Notice of Application to name both the Minister of Fisheries and Oceans and the Attorney General of Canada as respondents instead of the GMHA, or alternatively, only the Attorney General of Canada.

[8] My colleague, Prothonotary Aylen, determined that the GMHA, as the decision-maker, was not a proper respondent, that neither it nor the Minister were “directly affected” by the order sought, and that as a result, the Attorney General was the only appropriate respondent pursuant to Rule 303(2). On appeal of that order (2017 FC 1012), Justice Barnes of the Federal Court upheld the Prothonotary’s decision, holding that she had correctly applied Rules 303(1) and

303(2). He noted that the Attorney General had not, either before the Prothonotary or before him, made a formal motion for another person to be substituted as respondent pursuant to Rule 303(3). He declined to consider an informal motion to that effect, finding at paragraph 12 that:

> Many points arising during oral submissions before me that are relevant to that provision were not briefed and no evidence was presented to explain why the Attorney General is either unable or unwilling to act in a representative capacity, except to say that she will always be unwilling in cases like this one. Whether that is a meritorious view of the Attorney General's role should not be decided on the sparse record before me.

[9] The Attorney General now brings this motion to be substituted pursuant to Rule 303(3).

III. The Evidence and the Parties' Submissions

A. *The Attorney General*

[10] The evidence adduced by the Attorney General consists solely of the affidavit of an employee of the Department of Fisheries and Oceans Canada (DFO) who was Regional Director in charge of the Small Crafts Harbour program ("SCH") in the relevant region in 2015 and 2016.

[11] This director explains the SCH program, pursuant to which the DFO oversees compliance with the terms of the lease agreements signed with harbour authorities such as the GMHA, and sets out the circumstances in which the SCH became aware of the creation of the White Head access policy at issue and of the controversy in respect of its application to the Applicant. The affidavit makes it clear that the SCH and DFO played no role in the selection of the GMHA Board of Directors or in creating or dictating its policies or their implementation, that they limit

themselves to attending meetings when requested, and that they have no knowledge of how the GMHA applied its policy to the Applicant beyond what appears from the Certified Record prepared by the GMHA for the purposes of this application. The affidavit concludes that "The GMHA's decision to deny the Applicant access to White Head was an exercise of statutory authority in its management of the White Head Harbour. The GMHA is in the best place to provide the Court with submissions on the reasonableness of its application of its policy to Mr. Kinghorne".

[12] It is worth noting that the DFO employee who signed the affidavit does not purport to speak for the Attorney General or the Department of Justice, and does not speak to the willingness or ability of the Attorney General to act as a respondent, beyond stating his view that the GMHA is in the best place to do so. It is not clear whether the affiant reviewed the affidavit evidence filed by the GMHA, whether anyone at SCH, DFO or the Attorney General's office reached out to the GMHA to clarify or fill in any details that might be missing from the record, or whether cooperation was sought from, offered or withheld by GMHA at any point.

[13] It is not entirely clear from the Attorney General's arguments either whether she is unwilling or simply considers herself unable to act as respondent in this matter.

[14] The Attorney General's position that she should be removed as respondent and the GMHA substituted for her is based on two factors: that, as the sole creator of the policy and the body who applied it, the GMHA is best placed to speak to the decision and that, as the body who will have sole responsibility to comply with and implement the Court's decision, the GMHA is

also best positioned to speak to any concern it or the Court may have in that respect, since the Attorney General has no authority to compel the GMHA's cooperation in the application or compliance with the Court's orders.

[15] As to the applicable legal principles, the Attorney General relies on the recent Supreme Court decision in *Ontario (Energy Board) v Ontario Power Generation*, 2015 SCC 44, in which the Court considered the issue of the standing of administrative decision-makers to participate in appeals or reviews of their decisions. The Supreme Court concluded that Tribunal participation should be approached from a functional perspective, in which the need for fully informed adjudication should be balanced against the importance of maintaining tribunal impartiality. The Attorney General argues that the application of these factors favours the participation of the GMHA in this case, since it is the only available well-informed party capable of opposing the application and that concerns about maintaining the GMHA's impartiality do not arise, because the decision at issue is in the nature of the exercise of regulatory functions rather than an adjudicative decision between adversarial parties.

[16] In the alternative, the Attorney General asks that the GMHA be added as a respondent pursuant to Rule 104, as "a person whose presence before the Court is necessary to ensure that all matters in dispute may be effectually and completely determined".

B. *The GMHA*

[17] The GMHA opposes both the principal and the alternative relief sought in the Attorney General's motion.

[18] The GMHA does not deny that it acted independently from DFO in creating, implementing and applying the policy and that it is not, save for the obligation to comply with the terms of its lease, under the authority or control of DFO, or of the Attorney General for that matter.

[19] It denies, however, that it is solely responsible for the enforcement of its decisions regarding access to the harbour facilities. It filed the affidavit of the president of its Board of Directors, who asserts that the GMHA is dependent on and relies on DFO-SCH, and specifically, on the designated enforcement officer employed by DFO-SCH, for the effective implementation and enforcement of its operational policies, including those relating to berthage of vessels and public access.

[20] The president further explains that while the Board does not formally act in an adjudicative capacity in determining access to harbour facilities, it "must routinely weigh the competing interests of two or more parties to limited public resources. Directors are regularly required to make decisions and vote on issues that can have adverse consequences for their friends and fellow fishermen. In this sense, the Board is tasked with adjudicating conflict. A decision by the Board can have significant economic ramifications for the affected parties."

[21] Finally, the affidavit asserts that the GMHA is unaware of any deficiency in the factual record, having submitted a full record of all relevant documents and communications related to the application, as well as six detailed affidavits regarding the White Head policy and the circumstances of the case.

[22] The GMHA's central position on the motion is that the Attorney General has still not provided evidence or a compelling argument to explain why she is unable or unwilling to act as a respondent in this matter. It refers to this Court's decision in *Douglas v Canada (Attorney General)* 2013 FC 451, and its observation that, in acting as a respondent to a judicial review application, the Attorney General is not required to forcefully defend the application and may even support it or limit its participation to make submissions to assist the Court in reaching a decision that accords with the law.

[23] The GMHA points to *Archer v Canada (Attorney General)* 2012 FC 1175, in which the Attorney General acted as respondent to an application to review a decision made by a harbour authority acting under the same corporate structure and delegation of authority as the GMHA in this case, as evidence that there is nothing in the structure of the delegation of authority or subject matter of the dispute which would preclude the Attorney General's ability or willingness to act.

[24] Finally, the GMHA argues that, through its access to DFO-SCH representatives, as is evident from the affidavit filed in support of its motion, the Attorney General does have access to useful and relevant information in respect of, *inter alia*, the scope of the powers of harbour authorities and the management of harbours in the region.

C. *The Applicant*

[25] The Applicant did not take an active role on this motion, although his submissions tended to support the Attorney General's position.

IV. Analysis

[26] As the Attorney General recognizes, *Douglas v Canada* is the only reported case where the application of Rule 303(3) has been considered. The Court in that case set out the framework for the application of Rule 303 on the case before it as follows:

> [59] To summarize, then, the application of Rule 303, in the context of this judicial review application, proceeds from the following analytical sequence: as there are no persons directly affected by the order sought and required to be named as respondents pursuant to Rule 303(1), the Attorney General was properly named pursuant to Rule 303(2). Rule 303(2) requires that the Attorney General be named as a respondent by default to enable him to exercise his function as guardian of the rule of law. In exercising this function, the Attorney General is not required to defend the application. He may support it, or limit his participation to make submissions to assist the Court in reaching a decision that accords with the law. The Court may, on the motion of the Attorney General, consider whether another person should be named respondent in his place, but only if the Attorney General can show, and the Court is satisfied, that the Attorney General is unable to act as respondent.
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> (Emphasis added)

[27] Except for the fact that the Attorney General, on the motion before me, submits that she is not only unable but also unwilling to act, this framework for analysis is otherwise directly applicable to the matter before me. Both the Attorney General and the GMHA are *ad idem* that the decision at issue in this application constituted an exercise of the statutory power to manage and regulate public access to the harbour, delegated to the GMHA by the DFO, and is amenable to review pursuant to s 18.1 of the *Federal Courts Act*. It has already been judicially determined that there are no other persons directly affected by the order sought, and that the Attorney General was required to be named as a respondent, pursuant to Rule 303(2).

[28] The next step in the analysis is therefore to determine whether the Attorney General has led sufficient evidence or explanation to satisfy the Court that she is either unable or unwilling to act. This is not merely a question of determining whether there is another person or body that might be better placed than the Attorney General to defend the decision under review. As discussed in *Douglas*, at paragraphs 57 and 58, and as recognized by Justice Barnes when he declined to consider the application of Rule 303(3) in the absence of an evidentiary record, the Attorney General bears the burden of satisfying the Court that she is indeed either unable or unwilling to act as a respondent. It is only if the Court is so satisfied that the question arises as to which other person or body should be substituted for the Attorney General.

[29] The evidence before me does not support the conclusion that the Attorney General is unable to act as respondent in this matter. The Attorney General argues that she is not well-positioned to oppose the merits of the application, and does not possess sufficient knowledge about the background and rationale for the decision at issue to assist the Court in determining the issues before it. However, the affidavit submitted fails to point to any actual inadequacy or gap in the record as constituted by the Certified Tribunal Record and the six affidavits already provided by the GMHA, or how such inadequacy, assuming there is one, would affect the Attorney General's ability to fulfil her role as respondent.

[30] As to the alleged unwillingness of the Attorney General to act, there is simply no evidence of it. The affiant does not assert that the Attorney General is unwilling to act; he merely asserts his belief that the GMHA would be better placed to act, which is quite a different proposition. In any event, the affiant is employed in the Department of Fisheries and Oceans, and

not in the office of the Attorney General. There is no evidence or reason to believe that he could even be authorized to testify to the wishes or intentions of the Attorney General herself.

[31] The only explanation the Court can find for the Attorney General's stated inability or unwillingness to act are encompassed in the following paragraphs of her written representations:

> 24. The GMHA is not a part of the federal Crown nor is it a federal department. The AGC only acts on behalf of the Crown itself or federal government departments. The AGC is not empowered to represent the interests of the GMHA or otherwise take instructions or seek the input from the GMHA in the case at bar.
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> 25. The AGC's sole role in the present case is to act in the public interest. To this end, it can provide no useful input other than to opine on the decision under review, which is the very role of the Court in this application.
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> (Emphasis added)

[32] These submissions appear to proceed from the narrow perception of the role of the Attorney General as limited to acting as the in-house law firm for the Government, as those powers are described in paragraph 5(d) of the *Department of Justice Act*, RSC 1985, c. J-2. In that, they entirely ignore the important duties and functions described in paragraph 5(a) of that same Act. I reproduce below sub-paragraphs 5(a) and 5(d):

5 The Attorney General of Canada	5 Les attributions du procureur général du Canada sont les suivantes :
(a) is entrusted with the powers and charged with the duties that belong to the office of the Attorney General of England by law or usage, in so far as those powers and duties	a) il est investi des pouvoirs et fonctions afférents de par la loi ou l'usage à la charge de procureur général d'Angleterre, en tant que ces pouvoirs et ces fonctions

are applicable to Canada, and also with the powers and duties that, by the laws of the several provinces, belonged to the office of attorney general of each province up to the time when the *Constitutional Act, 1867*, came into effect, in so far as those laws under the provisions of the said Act are to be administered and carried into effect by the Government of Canada;	s'appliquent au Canada, ainsi que de ceux qui, en vertu des lois des diverses provinces, ressortissaient à la charge de procureur général de chaque province jusqu'à l'entrée en vigueur de la *Loi constitutionnelle de 1867* dans la mesure où celle-ci prévoit que l'application et la mise en œuvre de ces lois provinciales relèvent du gouvernement fédéral;
(…)	(…)
(d) shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada;	d) il est chargé des intérêts de la Couronne et des ministères dans tout litige où ils sont parties et portant sur des matières de compétence fédérale;

[33] The reasons in *Douglas* describe at length the special role which Attorney General plays in judicial review proceedings, a role which is consonant with the powers and charges described in paragraph 5(a) of the *Department of Justice Act*. That role is not that of a lawyer retained to represent the interests of the particular government department or official that acted as decision-maker, but the historic role of guardian of the public interest and defender of the rule of law. In fulfilling that role, the Attorney General is tasked with assisting the Court in reaching a decision that accords with the law, a delicate role which she is constitutionally obliged to exercise in good faith, objectively, independently, and in the public interest, even where it may lead her to take a position contrary to the decision-maker's decision (see full discussion in *Douglas* at paragraphs 60 to 70).

[34] It is that role which the Attorney General is called upon to fulfil when she is named respondent pursuant to Rule 303(2). And when she brings a motion pursuant to Rule 303(3) to be substituted in the role of respondent, the Court expects that she will have that particular role in mind when she addresses and explains the reasons why she is unable or unwilling to fulfil that role. With respect, the impression conveyed by the motion materials and representations of the Attorney General on this motion is that they set out the reasons why the Minister of Fisheries and Oceans feels that he is unable or unwilling to instruct the Department of Justice to defend the GMHA, and that the Attorney General never turned her mind to determining whether she is able or willing to fulfill her independent role, as contemplated in Rule 303(2).

[35] For these reasons, I am not satisfied that the Attorney General is, in the circumstances of this case, unable or unwilling to act as respondent. That is determinative of that part of the motion.

[36] I should add that I have considered the Attorney General's submissions with respect to the most recent pronouncement of the Supreme Court of Canada on the issue of the participation of tribunals in judicial reviews of their decisions, in *Ontario (Energy Board)*, above. However, as mentioned above, the issue of whether the GMHA could properly participate in the application, and would thus be an appropriate person to be substituted as respondent to this application does not arise, given that I have not been satisfied that the Attorney General is unable or unwilling to act.

[37] I now turn to the second part of the Attorney General's motion, requesting an order that the GMHA be joined as an additional respondent pursuant to Rule 104(1)(b). That particular rule empowers the Court to order that "a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceedings may be effectually and completely determined" be added as a party.

[38] The Court has already determined that the GMHA, as the decision maker, was not permitted to be named as respondent pursuant to Rule 303(1). It is therefore not a person who ought to have been joined as a party.

[39] The Attorney General submits that the GMHA's presence before the Court is necessary, for the same reasons she has given to argue that she is unable to act as respondent, and in particular, to ensure the completeness of the record. As mentioned above, I am not satisfied that the Attorney General is unable to act as respondent. Further, the evidence before me is to the effect that the GMHA has already provided both a full Certified Tribunal Record and several affidavits setting out the circumstances of the adoption of the policy and of its application to the Applicant. There is no evidence before me to the effect that the GMHA's further participation is necessary to shed light on any aspect of the decision, or, to the extent further information or assistance was requested by the Attorney General or the Applicant, that the GMHA would withhold it. There is no evidence that the GMHA needs to be named as a respondent in order to ensure its compliance with any of the orders sought in the application. Nor is there any evidence or compelling argument that the input of the GMHA might be necessary to craft an appropriate remedy in the circumstances.

[40] I accordingly have no basis to conclude that the GMHA's presence before the Court is necessary for the proper determination of all issues in this application. I have no doubt that the GMHA could, in the circumstances of this case and given the guidance provided in *Ontario (Energy Board)*, appropriately be granted leave to intervene if it felt the need to explain its record or was concerned that the Court's decision might impact its operations. However, the GMHA clearly does not desire to intervene or participate in this application and must be taken to be content with any decision the Court might make. The Rules of our Court do not provide for the forced joinder of a person who is neither required to be named nor a necessary participant in the litigation. I am also mindful of the GMHA's legitimate concerns that its independence and impartiality should be protected given the difficult circumstances in which the volunteers who make up its Board of Directors operate.

ORDER

THIS COURT ORDERS that:

1. The motion of the Attorney General is dismissed, with costs payable by the Attorney General to the Grand Manan Harbour Authority.

"Mireille Tabib"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1718-16
STYLE OF CAUSE:	SHAWN KINGHORNE V ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	SEPTEMBER 28, 2018
ORDER AND REASONS:	TABIB P.
DATED:	OCTOBER 23, 2018

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