Federal Court  Cour fédérale

Date: 20200901

Docket: T-351-20

Citation: 2020 FC 874

Ottawa, Ontario, September 1, 2020

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

SIOUX VALLEY DAKOTA NATION

Applicant

and

LEAHA TACAN

Respondent

ORDER AND REASONS

[1] Sioux Valley Dakota Nation [SVDN] seeks a stay of proceedings before an adjudicator hearing Ms. Tacan's complaint under the *Canada Labour Code*, RSC 1985, c L-2 [the Code]. In a preliminary ruling, the adjudicator found that Ms. Tacan's employment falls under federal jurisdiction. SVDN brought an application for judicial review of this preliminary ruling and would like this application to be decided before the adjudicator hears the merits of Ms. Tacan's complaint.

[2] I am dismissing SVDN's motion, because the underlying application for judicial review is premature. As a result, the test for granting a stay is not satisfied.

[3] A motion for a stay of proceedings is decided according to the framework laid out by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*]. The applicant must show that (1) the underlying application raises a serious issue; (2) the stay is necessary to avoid irreparable harm; and (3) the balance of convenience favours the granting of the stay.

[4] The doctrine of prematurity is a well-known aspect of judicial review. Briefly put, courts will refrain from reviewing interlocutory decisions of administrative bodies, save in exceptional circumstances: *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paragraph 31, [2011] 2 FCR 332 [*CB Powell*]; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364; *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, at paragraph 74, [2016] 1 SCR 29. The doctrine of prematurity applies also in the context of a motion for a stay. However, in *Newbould v Canada (Attorney General)*, 2017 FCA 106 at paragraph 24, [2018] 1 FCR 590, the Federal Court of Appeal stated that prematurity should not be considered as a threshold issue, but rather as a factor that may be considered at the serious issue stage of the *RJR-MacDonald* test. As I show below, the doctrine of prematurity also provides insights relevant to the other two stages of the *RJR-MacDonald* test.

I. Serious Issue

[5] SVDN's application raises the issue of jurisdiction over labour relations. Before the adjudicator, SVDN argued that Ms. Tacan was employed by the Sioux Valley Health Centre [SVHC]. It asserted that SVHC should be considered a separate employer for jurisdictional purposes, even though it is not a legal entity separate from SVDN. On the strength of *NIL/TU,O Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 SCR 696 [*NIL/TU,O*], it argued that SVHC falls under provincial jurisdiction and that the Code does not apply. The adjudicator rejected those submissions. In the underlying application before this Court, SVDN reiterates these arguments.

[6] For the purposes of deciding this motion, I need not decide this constitutional issue. I note, however, that the Federal Court of Appeal held that, in spite of *NIL/TU,O*, employees of a First Nation, as opposed to those of a separate legal entity providing services to Indigenous persons, presumptively fall under federal jurisdiction: *Conseil de la Nation Innu Matimekush-Lac John v Association of Employees of Northern Quebec (CSQ)*, 2017 FCA 212 at paragraphs 39–45; *Quebec (Attorney General) v Picard*, 2020 FCA 74 at paragraphs 60–63. Even after reading SVDN's detailed written argument, it is unclear to me that these cases can be distinguished.

[7] The most important difficulty, however, is that SVDN is seeking judicial review of an interlocutory decision of the adjudicator. This runs directly against the doctrine of prematurity. I note that applications for judicial review of interlocutory decisions are premature even if they

relate to "jurisdictional" or constitutional issues: see, for instance, *CB Powell*, at paragraphs 39-46; *Black v Canada (Attorney General)*, 2013 FCA 201 at paragraphs 18-19; *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2017 FCA 241 at paragraph 48. In the context of the Code, this Court has concluded that challenges to the adjudicator's jurisdiction do not justify judicial review of interlocutory decisions: *Entreprise Publique Économique Air Algérie, Montréal, Québec v Hamamouche*, 2019 FC 272.

[8] Moreover, in *Dugré v Canada (Attorney General)*, 2020 FC 602, my colleague Justice Yvan Roy, after reviewing this Court's case law on the issue, concluded that an application for judicial review that is obviously premature, because it challenges an interlocutory decision, does not give rise to a "serious issue" for the purposes of a motion for a stay.

[9] Beyond arguing that the matter raises constitutional or jurisdictional questions, SVDN does not show that the circumstances are exceptional and that the doctrine of prematurity should be disregarded. Thus, SVDN fails to show that its underlying application raises a serious issue. Rather, it is most likely to be dismissed as being premature.

II. Irreparable Harm

[10] Most importantly, SVDN does not show that a stay is necessary to avoid irreparable harm. It argues that letting the adjudicator rule on the merits would be a "waste of time." If, for example, the adjudicator rules in favour of Ms. Tacan but SVDN ultimately prevails on the constitutional issue, SVDN will be unable to recover its expenses in relation to the hearing on the merits.

[11] This alone, however, cannot be considered irreparable harm, unless the doctrine of prematurity is turned on its head. Defending legal proceedings necessarily requires time and resources. Some procedural settings provide means to dismiss unfounded cases at an early stage. When properly used, this possibility may save time and resources: *Canada (Attorney General) v Lameman*, 2008 SCC 14 at paragraph 10, [2008] 1 SCR 372. But this is not necessarily so. Attempting to dismiss proceedings at an early stage itself requires time and resources. In some circumstances, this may outweigh any benefit associated with early resolution: *Hryniak v Mauldin*, 2014 SCC 7 at paragraph 74, [2014] 1 SCR 87. In administrative law, the doctrine of prematurity embodies the observation that judicial review of interlocutory decisions rarely has the effect of streamlining justice and reducing costs. Thus, the completion of the hearing before the adjudicator cannot constitute irreparable harm, even if it entails certain costs: see, for example, *Couchiching First Nation v Baum*, 2010 FC 322 at paragraphs 18–20.

[12] In any event, there is nothing irreparable in the adjudicator's interlocutory decision. It does not do anything that cannot be undone at a later stage of the proceedings. SVDN will be able to make its constitutional argument on judicial review of the adjudicator's decision on the merits. Indeed, the doctrine of prematurity is based on the idea that a preliminary decision very rarely does something irreparable. As my colleague Justice Simon Noël wrote in similar circumstances, "This does not constitute harm. It is an attempt to change the course of the proceedings to suit [SVDN's] preferences:" *Girouard v Canada (Attorney General)*, 2017 FC 449 at paragraph 59.

[13] SVDN also argues that it would suffer irreparable harm because its "constitutional development" is at stake. It relies on *Siksika Health Services v Health Sciences Association of Alberta*, 2017 ABQB 683 [*Siksika*], in which a stay was granted in somewhat similar circumstances. However, unlike *Siksika*, SVDN does not argue that the adjudicator's decision infringes upon aboriginal or treaty rights protected by section 35 of the *Constitution Act, 1982*. What the Court said in that case is that given that the definition of those rights remains a work in progress, their infringement can hardly be compensated in damages. With respect, however, that begs the question whether there is any harm in the first place. Here, SVDN has not shown any concrete harm. In any event, a recent decision of the Federal Court of Appeal makes it clear that aboriginal and treaty rights protected by section 35 have no bearing on division of powers issues: *Canada (Attorney General) v Northern Inter-Tribal Health Authority Inc*, 2020 FCA 63 at paragraphs 28-31.

[14] SVDN concluded a self-government agreement with the governments of Canada and Manitoba. That agreement came into force in 2014. It was given effect by federal and provincial legislation. SVDN does not explain how the implementation of that self-government scheme would be irreparably harmed if this Court reviews the adjudicator's opinion on the constitutional question only after he rules on the merits of Ms. Tacan's complaint. In any event, I note that section 30.01(1)(f) of the self-government agreement explicitly excludes "occupational health and safety, labour relations and working conditions" from SVDN's jurisdiction to make laws.

III. Balance of Convenience

[15] At the third stage of the *RJR-MacDonald* test, the court must compare harm to the moving party if the stay is dismissed and harm to the responding party if the stay is granted.

[16] Once again, the doctrine of prematurity bears heavily on the comparison. The doctrine is the product of the collective wisdom of our judiciary. Judges have observed that judicial review of interlocutory decisions typically results in a waste of time and resources. Justice David Stratas of the Federal Court of Appeal summarized this collective wisdom in *CB Powell*, at paragraph 32:

> This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway […].

[17] Moreover, the public interest may be considered when assessing the balance of convenience. One of the dominant themes of administrative law is respect for the autonomy of administrative decision-makers. Thus, it is in the public interest "to respect the legislature's choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court:" *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 12.

[18] Here, it is obvious that granting a stay and allowing SVDN's application for judicial review to proceed would significantly prejudice Ms. Tacan, who remains unemployed and is

unable to pay for legal services. Indeed, granting a stay would frustrate Parliament's intention to provide a quick and effective remedy.

IV. Conclusion

[19] SVDN fails to meet each of the three prongs of the *RJR-MacDonald* test. Accordingly, its motion for a stay will be dismissed.

ORDER in T-351-20

THIS COURT ORDERS that:

1. The applicant's motion for a stay of proceedings is dismissed.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-351-20
STYLE OF CAUSE:	SIOUX VALLEY DAKOTA NATION v LEAHA TACAN

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	GRAMMOND J.
DATED:	SEPTEMBER 1, 2020

APPEARANCES:

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Leaha Tacan	FOR THE RESPONDENT (ON HER OWN BEHALF)

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