

Federal Court



Cour fédérale

Date: 20160609

Docket: T-374-15

Citation: 2016 FC 645

Ottawa, Ontario, June 9, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

**0769449 B.C. LTD.
dba KIMBERLY TRANSPORT**

Applicant

and

VANCOUVER FRASER PORT AUTHORITY

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a trucking and drayage company whose licence to access the premises of the Vancouver Fraser Port Authority was terminated in August 2014 for alleged violations of its licence agreement with the Port. The Applicant alleges bias in the decision-making process that resulted in termination of its licence and that the termination decision was unreasonable. The Respondent argues, amongst other things, that this application is now moot because the

jurisdiction to grant licences to access the Port's premises has been transferred by statute to another administrative body.

I. Background

[2] The Applicant, 0769449 B.C. Ltd, carries on business as Kimberly Transport [Kimberly]. Kimberly is a multi-service trucking company headquartered in Delta, BC, whose president and CEO is Thomas Johnson. Mr. Johnson began as a truck driver in 1995, becoming an independent owner in 1997 and later started Kimberly with his wife. Over time, the company grew its operations and expanded into drayage work at the Port. In 2005, Kimberly acquired highway trucks and began transporting goods in British Columbia and to Alberta and Saskatchewan. By 2009, Kimberly owned a 25,000 square foot warehouse, and had over 30 company trucks, 150 container chassis trailers, three crane trucks, 15 flat deck trailers, and low bed equipment.

[3] In 2005, there was a labour dispute at the Port. After this dispute ended, the Port implemented a more comprehensive licensing system, known as the Truck Licensing System [TLS], for trucking companies accessing the Port's premises. Kimberly entered into a licence agreement under the TLS so its container trucks could access the Port's premises; this agreement was renewed annually up until the time Kimberly's licence was terminated by letter dated August 22, 2014.

[4] On January 1, 2008, the Vancouver, Fraser River, and North Fraser Port Authorities amalgamated to form the Vancouver Fraser Port Authority, carrying on business as Port Metro Vancouver [PMV]. Kimberly managed its trucks and licences through PMV's Pacific Gateway

Portal website. This Portal allowed TLS licensees such as Kimberly to transfer licences among trucks accessing PMV premises and to update licence plate numbers and truck unit numbers. The Portal also enabled a licensee, subject to PMV's approval, to add new trucks to the licensee's fleet.

[5] Kimberly never obtained licences for its entire fleet of trucks. Since Kimberly's renewals for trucks in the TLS fell at the end of October, Mr. Johnson sometimes delayed paying the \$300 per truck fee until Kimberly's business picked up. Mr. Johnson says that this was regularly allowed by PMV. For the licence agreement between PMV and Kimberly running from November 1, 2011 to October 31, 2012, Kimberly was approved for 12 trucks; and for the licence agreement for November 1, 2012 to October 31, 2013, Kimberly was approved for 14 trucks. For the licence agreement in effect from November 1, 2013 to October 31, 2014, Kimberly paid for six approved vehicles on October 28, 2013; and on November 18 and November 20, 2013, Kimberly paid the fee for two additional trucks, bringing the total approved number of vehicles for this time period to eight.

[6] On March 4, 2013, PMV informed Kimberly it had been selected to take part in a mandatory pilot project to install GPS tracking units in trucks which accessed PMV premises. Initially, the PMV GPS units were installed in four Kimberly trucks and were located close to Kimberly's own GPS units. Mr. Johnson states that the PMV units looked virtually identical to those of Kimberly.

[7] In late February 2014, another labour dispute erupted at the Port, lasting several weeks. As part of the resolution of this dispute, PMV reformed the TLS and, after learning of the changes, Kimberly joined the BC Trucking Association [BCTA]. On March 28, 2014, PMV cancelled the access of external users, including Kimberly, to the Portal. On April 7, 2014, PMV informed licence holders under the TLS that there would be a moratorium, effective immediately, on additional trucks being approved for access to PMV premises. The moratorium notice stated:

PMV will continue to process pending applications for new company trucks, if those applications were received prior to the issuance of this announcement at 3:00 pm, April 7, 2014, and if the applicant FSO provides evidence that demonstrable investment commitments had already been made prior to the announcement.

[8] When this moratorium occurred, two of Kimberly's vehicles were in the system but either their renewal had not been completed or updated insurance information had not yet been submitted. Mr. Johnson indicates these trucks were in a pending status, but PMV asserts that they had been rejected and were not pending. In addition, Kimberly was in the process of acquiring another truck, and had paid for significant engine work on it; the agreement relating to this truck had been made on April 1 and it was in Kimberly's possession on April 2, but the transfer tax form showing transfer of the truck was dated April 9, two days after the moratorium. Kimberly understood the moratorium to mean that existing trucks in the system would be processed for approval and that if there were demonstrable investment commitments to a truck's purchase prior to April 7, that truck would also be processed.

[9] On April 10, 2014, Mr. Johnson attended a BCTA meeting where he met Greg Rogge, who was the PMV representative chairing the meeting about changes to the TLS. At the meeting,

Mr. Johnson aired his frustrations about the changing system, and raised the issue of the moratorium and Kimberly's trucks which were awaiting renewals. Mr. Johnson claims that Mr. Rogge assured him that processing Kimberly's renewals would not be a problem and promised to look into the matter.

[10] On May 5, 2014, Mr. Johnson emailed PMV regarding his conversation with Mr. Rogge. However, on May 7, 2014, PMV advised Kimberly that its renewal applications were disapproved, stating that these trucks counted as new additions because the trucks had been out of Kimberly's approved fleet since November 2013. Mr. Johnson replied on May 7, requesting that the applications be processed since the trucks were not new; but on May 9, 2014, PMV again denied the renewals and also denied the new truck as an addition because it had been purchased on April 9.

[11] Mr. Johnson states that following the denials of his renewal requests he sent several emails to PMV, including some he characterizes as being "somewhat offensive." On May 14, 2014, Mr. Johnson received an email from PMV's legal counsel, Harley Harris, advising that he would review the matters raised by Mr. Johnson's emails and that Kimberly should speak exclusively with Mr. Harris about the denied renewals. By letter dated May 27, 2014, Mr. Harris informed Kimberly that the situation concerning the renewal applications and the new truck would not be revisited.

[12] On June 20, 2014, Mr. Johnson asked PMV to send Kimberly a screenshot of all of its approved trucks and their VIN numbers since external users no longer had access to the Portal to

ascertain what trucks were or were not approved. PMV replied via an email dated June 20, 2014. Mr. Johnson states that he believed the email showed all nine Kimberly trucks as having approved status and did not realize at that time there was another approval column on the far right of the email attachment that required the user to scroll over to view.

[13] On June 25, 2014, Mr. Johnson received a notice from PMV that Kimberly's licence was suspended, effective immediately, since three of Kimberly's trucks which were not approved had accessed PMV property. Mr. Johnson says there was no warning for this suspension, and when he attempted to contact PMV he was directed to PMV's legal counsel. Kimberly immediately retained legal counsel, and its counsel sent a letter to Mr. Harris, PMV's legal counsel, on June 25, 2014. Mr. Johnson claims Kimberly did not dispute PMV's GPS data showing access to PMV premises by unapproved Kimberly trucks because maintenance personnel may have swapped PMV GPS units with identical-looking Kimberly GPS units.

[14] Following suspension of Kimberly's licence, Mr. Johnson contacted Louise Yako, president and CEO of the BCTA in an attempt to speak with PMV about the suspension of Kimberly's licence. However, PMV told Ms. Yako that it would not meet with them and she should not speak to anyone at PMV regarding the Kimberly situation.

[15] On August 22, 2014, PMV emailed a letter to Kimberly terminating its licence. It is this letter and the reasons for the decision to terminate Kimberly's licence which are the subject matter of this application for judicial review. At the time of this letter, Mr. Johnson had no idea who was responsible for the decision to terminate Kimberly's licence. Subsequently though, after

Kimberly's current legal counsel applied to this Court for an order of mandamus to compel PMV to disclose the decision-maker's identity, PMV revealed that Mr. Rogge had made the decision. Once the decision-maker's identity was known, the Court allowed Kimberly an extension of time to file this application for judicial review in respect of PMV's termination decision.

[16] Subsequent to the decision to terminate Kimberly's licence, Kimberly continued to access PMV premises in connection with non-TLS related drayage of oversized containers and other cargo requiring specialized drayage equipment. However, a new regulatory framework was enacted subsequent to the termination of Kimberly's TLS licence to govern the issuance of licences under a reformed TLS. Pursuant to the *Container Trucking Act*, SBC 2014, c 28, and the *Container Trucking Regulation*, BC Reg 248/2014, the British Columbia Container Trucking Commissioner, not PMV, now has the jurisdiction and authority to issue licences to carry out container trucking services at PMV premises; PMV retains jurisdiction and authority to issue access agreements in respect of its premises to companies licenced by the Commissioner pursuant to the new framework. In a letter from PMV's legal counsel dated November 3, 2015, PMV advised Kimberly that it was no longer ineligible from applying for a PMV access agreement if or when it is in a position to secure a TLS licence from the Commissioner.

II. Issues

[17] The Applicant raises several issues, notably as to: whether Kimberly had a legitimate expectation that PMV would provide a warning or advise of unauthorized entrances to PMV premises before suspending or terminating its licence; whether it was reasonable for PMV to conclude there was an "urgent circumstance" in suspending Kimberly's licence; whether Mr.

Rogge was a biased decision-maker who should have recused himself from making the impugned decision; and whether the decision was reasonable in view of the provisions of the licence agreement.

[18] However, I agree with the Respondent that the main issue, indeed in the Court's view the determinative issue, is whether this application for judicial review has become moot.

III. Analysis

[19] The Applicant concedes that PMV no longer possesses the statutory authority for issuing licences under the TLS and, therefore, requests only a declaration that its rights to a fair procedure were breached in terminating its licence or that an unreasonable decision was made and it should be set aside. The Applicant says there are immense practical consequences for it because a determination by the Court that its licence was unfairly or unreasonably terminated might affect its ability to obtain a TLS licence from the British Columbia Container Trucking Commissioner.

[20] The Respondent contends that Kimberly cannot avoid a determination of mootness merely by seeking declaratory relief. The Respondent states that intervening events, notably the new regulatory framework for the issuance of licences under the TLS, have extinguished the once live controversy between the parties, and that the issues raised by this judicial review application are not such that they rise to a level of public importance to make a judicial determination on the merits in the public interest.

[21] In *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at para 15, 57 DLR (4th) 231 [*Borowski*], the Supreme Court of Canada stated that the doctrine of mootness “applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case.” This involves a two-step analysis: “First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case” (*Borowski* at para 16).

[22] Accordingly, in a case where there is “no longer a live controversy or concrete dispute” the case can be determined to be moot (*Borowski* at para 26). Even if a case may be moot because there is no longer a live controversy or concrete dispute, it is nevertheless necessary for the Court to determine whether it should exercise its discretion to hear and determine the case on the merits where circumstances warrant. Three overriding principles are to be considered in this second step of a mootness analysis: (1) the presence of an adversarial relationship; (2) the need to promote judicial economy; and (3) the need for the court to show a measure of awareness of its proper role as the adjudicative branch of government (*Borowski* at para 40; see also *Harvan v Canada (Citizenship and Immigration)*, 2015 FC 1026 at para 7, 257 ACWS (3d) 923 and *Khalifa v Canada (Citizenship and Immigration)*, 2016 FC 119 at para 18, 263 ACWS (3d) 30). The Court should consider the extent to which each of these principles may be present in a case, and the application of one or two may be overborne by the absence of the third and vice versa (see: *Borowski* at para 42).

[23] The Supreme Court in *Borowski* identified several instances where the Court's discretion may be exercised to allow it to hear and decide a case which might otherwise be moot. For example, if: (1) there is still the necessary adversarial relationship between the parties even though the live issue or concrete dispute no longer exists; (2) the Court's decision will have practical effect on the rights of the parties (see *Borowski* at para 35); (3) the case is one of recurring but brief duration, such that important questions might otherwise evade judicial review (see *Borowski* at para 36); or (4) where issues of public importance are at stake such that resolution is in the public interest, though the mere presence of a matter of national importance is insufficient (*Borowski* at paras 37 and 39).

[24] In view of *Borowski*, and the new regulatory framework enacted to govern the issuance of licences under the reformed TLS, I find that this application for judicial review of PMV's decision to terminate the Applicant's licence has been rendered moot. Furthermore, nothing in the record or in the parties' written and oral submissions compels the Court to exercise its discretion to determine this application on its merits and grant the declaratory relief requested by Kimberly. There is no longer any live controversy or concrete dispute arising from the termination of Kimberly's licence, and no useful purpose would be served by reviewing the merits of PMV's termination decision or the manner in which such decision was rendered. As noted by the Court in *Ficek v Canada (Attorney General)*, 2013 FC 430, 228 ACWS (3d) 608 (at para 12): "the doctrine of mootness may not be avoided merely by seeking declaratory relief (see *Rahman v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 137, 216 FTR 263)."

[25] This is not an appropriate case for the Court to exercise its discretion to determine the merits of this application for several reasons. First, in view of the evidence on the record and that adduced at the hearing of this matter, a decision by the Court on the merits of this application, declaratory or otherwise, will not have any practical effect on the rights of the parties because PMV is no longer responsible for or capable of issuing licences under the TLS; that role now lies with the British Columbia Container Trucking Commissioner. The transfer of that jurisdiction from PMV to the Commissioner for the issuance of licences under the TLS is clearly within the purview of the legislative branch. The Court should be mindful of its role as the adjudicative branch of government and refrain from making any pronouncements or determinations concerning how that jurisdiction may have been exercised in the past which might impact upon some future exercise of such jurisdiction.

[26] Second, as to judicial economy, the Respondent did not make a motion (as it could have done so) prior to the hearing of this matter to have the application dismissed by reason of mootness. Nevertheless, an application for judicial review can certainly be dismissed for mootness at the time of the hearing without the necessity of a motion prior to the hearing (see, e.g., *Gladue v Duncan's First Nation*, 2015 FC 1194, 259 ACWS (3d) 5). To the extent that the Court should be mindful of utilizing scarce judicial resources by hearing matters which are otherwise moot, those resources were, for the most part, already expended upon the hearing of this matter.

[27] Third, the issues raised by this application for judicial review cannot be characterized as being of such a nature that they raise important questions which might otherwise evade review by the Court.

[28] Lastly, this application does not raise or concern issues of such public importance that resolution of such issues would be in the public interest. Although the Applicant's allegations that PMV misused its power and was biased in the decision-making process that resulted in termination of its licence do attract some degree of public interest, given PMV's status as a public authority, these allegations are not supported by the evidence before the Court such that it should exercise its discretion to determine the merits of the application.

IV. Conclusion

[29] Accordingly, as stated above, the application for judicial review of PMV's decision to terminate the Applicant's licence is moot, and this is not an appropriate case for the Court to exercise its discretion to determine or decide the merits or substantive issues concerning such decision.

[30] As to the issue of costs, the parties advised the Court at the hearing of this matter that they had agreed upon an appropriate all-inclusive amount and that costs should follow the cause unless the application is determined on the basis of mootness, in which case the Applicant says there should be no order as to costs while the Respondent says there should be such an order. However, in my view of all the circumstances of this case, no award of costs is warranted.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed
and there shall be no order as to costs.

"Keith M. Boswell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-374-15

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VANCOUVER FRASER PORT AUTHORITY

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