Federal Court  Cour fédérale

Date: 20171109

Docket: T-1718-16

Citation: 2017 FC 1012

Ottawa, Ontario, November 9, 2017

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

SHAWN KINGHORNE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] This is an appeal from the Order of Prothonotary Mandy Aylen whereby the Grand Manan Harbour Authority [Authority] was removed as a Respondent in this proceeding and the Attorney General of Canada was added in its place.

[2] The Attorney General brings the appeal with a view to reversing the Prothonotary's Order dated May 10, 2017. The Applicant, Shawn Kinghorne, supports the appeal but the Authority opposes it.

[3] Mr. Kinghorne's underlying application for judicial review challenges the Authority's decision to exclude his access to White Head Harbour on the commencement of the 2016 lobster fishing season. The asserted grounds for relief include allegations that the Authority acted unfairly and misapplied its authority. Mr. Kinghorne's application initially named only the Authority as a Respondent. By way of motion to the Prothonotary, the Authority sought to be removed and replaced by the Attorney General in accordance with Federal Courts Rule 303(2). Rule 303(2) provides that the applicant must name the Attorney General as a respondent in circumstances where no other party "can be named" and, in particular, where the only other affected party is the tribunal whose decision is the subject of the underlying application.

[4] The Prothonotary's Order was made in connection with the Authority's motion in writing brought under Rule 369. The Attorney General was appropriately given notice of the motion and responded in the following way:

> My client has no legal interest in the issues before the Court, nor do we have any involvement with the creation or application of the policies enacted by the Respondent's Board of Directors in its management of the Grand Manan Harbour ("harbour"). Accordingly, we are not in a position to present an argument in this case that would facilitate the Court's consideration of the decision under review.
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> The Minister entered into a private commercial contract with the Respondent to manage the harbour. A copy of that lease is before the Court in the Respondent's Motion Record as Exhibit "B" to the Affidavit of Melanie Diane Sonnenberg. In accordance with section 7(2) of that lease, the Respondent has the authority to refuse access or the use of the harbour to any person if it would render the use of the harbour unsafe.
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> The Applicant is challenging the Respondent's decision not to allow him to depart from the harbour on the first day of the lobster season. From the Affidavit of Melanie Sonnenberg at paragraph 12, it appears the decision was made in accordance with a policy created by the Respondent's Board of Directors to ensure

> the safe use of the harbour. The Department of Fisheries and Oceans ("DFO") did not direct or authorize the creation of the policy in question, nor did it oversee its implementation.
>
> The Respondent's motion seeks to deflect a review of its decision to restrict the Applicant's access to the harbour to a review of its lease agreement with the DFO, The Federal Court is not the proper forum for that discussion. The lease is a private commercial agreement. If the Respondent wishes to review or delineate its responsibilities under the lease, it is a matter to be addressed between the parties to the agreement.
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> There is no dispute that Rule 303(2) of the *Federal Courts Rules* provides that where no other person can be named as a respondent, an applicant should name the AGC. It simply does not apply to these circumstances. In *Archer v. Canada*, Mr. Justice Rennie held that the Minister has the power to delegate his authority over the use, management and maintenance of public harbours by way, of leases. This is what occurred. As the Respondent is exercising the delegated authority of the Minister, when its Board of Directors makes a decision, it is the proper respondent. It is only the Grand Manan Harbour Authority that can provide the necessary background, including a certified tribunal record, to enable a proper review of the decision at issue.
>
> To be clear, officials from DFO do assist the various harbour authorities across the country, including the Respondent, when questions or issues arise regarding their responsibilities under the lease agreements. This might include, as it did in the present case, the attendance of DFO officials at meetings held by the Respondent's Board of Directors. This does not make them interested parties. They do not direct or oversee the management of the harbours. That function belongs to the harbour authorities and their Boards of Directors. If the Minister were called to task for the many decisions made by harbour authorities across the country in the exercise of their delegated authority, it would defeat the purpose of the delegations.
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> [Footnotes omitted.]

[5] For reasons that are not entirely clear or persuasive, the Attorney General chose not to seek relief under Rule 303(3) at any point. Rule 303(3) states:

Marginal note: Substitution for Attorney General	Note marginale: Remplaçant du procureur général
(3) On a motion by the Attorney General of Canada, where the Court is satisfied that the Attorney General is unable or unwilling to act as a respondent after having been named under subsection (2), the Court may substitute another person or body, including the tribunal in respect of which the application is made, as a respondent in the place of the Attorney General of Canada.	(3) La Cour peut, sur requête du procureur général du Canada, si elle est convaincue que celui-ci est incapable d'agir à titre de défendeur ou n'est pas disposé à le faire après avoir été ainsi désigné conformément au paragraphe (2), désigner en remplacement une autre personne ou entité, y compris l'office fédéral visé par la demande.

[6] The Attorney General now argues on this appeal that the Court should waive the requirement for a formal motion under the above Rule. In the absence of evidence and full legal argument, the Attorney General maintains that she is unable and unwilling to act as a Respondent such that the Prothonotary's Order should now be reversed.

[7] In its oral submissions on this appeal, counsel for the Attorney General attempted to make the case for relief under Rule 303(3) by arguing that it is under no obligation to defend or support the Authority's decisions. In essence, the position of the Attorney General is that the Department of Fisheries and Oceans has fully divested its authority for the management of the White Head Harbour facility to the Authority by way of a commercial lease agreement and thereby off-loaded any responsibility to act in a representative capacity in connection with the Authority's decisions – including decisions to restrict public access to harbour facilities.

[8] There is some potential merit to the Attorney General's position and it is unfortunate that the arguments made to me on this appeal were not advanced to the Prothonotary by way of an intervening motion under Rule 303(3). There is authority for the view that the Attorney General's public interest mandate may not always align with the interests of the tribunal whose decision is impugned on judicial review. The Attorney General does have a discretion to adopt a different or contrary position to that of the tribunal: see *Hoechst Marion Roussel Canada v Attorney General of Canada*, 2001 FCT 795 at para 67, 13 CPR (4th) 446; *Douglas v Attorney General of Canada*, 2014 FC 299 at para 50, [2015] 2 FCR 911.

[9] I accept that the public interest will not always lie in blind subservience by the Attorney General to decisions of the sort made here. There could well be situations where the Attorney General reasonably concludes that a decision taken by a harbour authority was contrary to law (e.g. discriminatory) or unfairly made. In such a situation, the Attorney General would be in an untenable conflict and unable to fulfill a meaningful representative role. For reasons that are meaningful to the enforceability of a resulting order, it may also be prudent to have a corporate decision-maker like the Authority named as a respondent. It is not entirely clear on the present record, however, that the contractual delegation of statutory authority to a private legal entity will, in every case, relieve the Attorney General of any and all responsibility to appear on a judicial review. In some cases, relief under Rule 303(3) may be appropriate and in other cases perhaps not. What is clear is that someone must appear in this proceeding to defend the lawfulness of the Authority's decision. The concerns expressed in *Ontario Energy Board v Ontario Power Generation Board*, 2015 SCC 44, [2015] 3 SCR 147 [*Ontario Energy*], about "ensuring that the principles of finality and impartiality are respected without sacrificing the

ability of reviewing courts to hear useful and important information and analysis" remain valid notwithstanding the contractual model of delegation employed in this situation (see para 52). It seems to me that Rule 303(3) is the appropriate mechanism for resolving standing disputes of the sort arising here in that it meets the discretionary function described in *Ontario Energy*, above, at para 57:

> [57] I am thus of the opinion that tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

[10] It follows, of course, that in some situations it may be appropriate that both the Attorney General and the decision-maker be joined as respondents.

[11] On the record before me I can identify no palpable and over-riding error in the Prothonotary's decision. She correctly applied Rule 303(2) to the circumstances before her. A request for relief under Rule 303(3) was not advanced to her either formally or informally and, in an evidentiary and analytical vacuum, she did not err by not considering that provision.

[12] I am similarly not prepared to waive the usual requirement for a motion under Rule 303(3). 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.

[13] For the foregoing reasons this appeal is dismissed with costs payable by the Attorney General to the Authority at the mid-point of Column III.

ORDER in T-1718-16

THIS COURT ORDERS that the within appeal is dismissed with costs payable by the Attorney General of Canada to the Grand Manan Harbour Authority at the mid-point of Column III.

"R.L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1718-16
STYLE OF CAUSE:	SHAWN KINGHORNE v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	OCTOBER 11, 2017
ORDER AND REASONS:	BARNES J.
DATED:	NOVEMBER 9, 2017

APPEARANCES:

Robert Mroz	FOR THE APPLICANT
Jessica Harris	FOR THE RESPONDENT
Sara Shiels Natalie Clifford	FOR THE GRAND MANAN HARBOUR AUTHORITY

SOLICITORS OF RECORD:

McInnes Cooper Fredericton, NB	FOR THE APPLICANT
Attorney General of Canada Halifax, NS	FOR THE RESPONDENT
Clifford Shiels Legal Yarmouth, NS	FOR THE GRAND MANAN HARBOUR AUTHORITY