Federal Court  Cour fédérale

Date: 20220830

Docket: T-551-21

Citation: 2022 FC 1242

Ottawa, Ontario, August 30, 2022

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

SEASPAN MARINE CORPORATION

Applicant

and

ANDREAS SMOLIK and CANADIAN HUMAN RIGHTS COMMISSION

Respondents

ORDER AND REASONS

I. Overview

[1] The underlying application for judicial review filed by Seaspan Marine Corporation [Seaspan] relates to a decision of the Canadian Human Rights Tribunal [Tribunal] which determined that Seaspan discriminated against one of its employees, the respondent Andreas Smolik, on the basis of his family status and did not reasonably accommodate Mr. Smolik to the point of undue hardship. Seaspan seeks by way of the present motion to have

the Court strike in its entirety the memorandum of fact and law [memorandum] of the co-respondent, the Canadian Human Rights Commission [Commission], on the basis that the Commission is tantamount to the administrative tribunal and thus should not be participating in the judicial review of the decision of the Tribunal. Seaspan concedes that this is a novel argument on its part.

[2] Seaspan argues that the restrictions normally imposed on administrative tribunals that appear as a party in applications for judicial review of their own decisions should apply to the Commission in this case even though, admittedly, the decision subject to judicial review is that of the Tribunal and not of the Commission. I disagree; I have not been persuaded that either pursuant to the *Canadian Human Rights Act*, RSC 1985, c H-6 [Act], or at common law, the memorandum should be struck at this stage. For the reasons that follow, I would dismiss the present motion.

II. Background

[3] Seaspan is a marine transportation company that operates along the west coast of North America. Mr. Smolik had been employed by Seaspan as a marine engineer since 1997. In 2013, Mr. Smolik became a single parent following the loss of his wife and could no longer continue to be away from his children, aged 9 and 6 at the time, for the two- to three-week periods required to work on coastal vessels. Discussions between Mr. Smolik and Seaspan, the details of which are less relevant to the present motion, ensued, but Mr. Smolik eventually filed a complaint with the Commission.

[4] Following its investigation, the Commission referred the matter to the Tribunal pursuant to subsection 49(1) of the Act, which reads:

Request for inquiry	**Instruction**
49(1) At any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.	49(1) La Commission peut, à toute étape postérieure au dépôt de la plainte, demander au président du Tribunal de désigner un membre pour instruire la plainte, si elle est convaincue, compte tenu des circonstances relatives à celle-ci, que l'instruction est justifiée.

[5] As a result of mediation, Seaspan and Mr. Smolik reached an agreement in principle in respect of the complaint, but the Canadian Merchant Service Guild, with whom Mr. Smolik was a member, refused to support the settlement on the basis that, rightly or wrongly, it contravened the provisions of the governing collective agreement. No further efforts were undertaken by Seaspan to accommodate Mr. Smolik, who eventually found employment with another shipping company.

[6] The Commission took an active role in the hearing before the Tribunal, arguably in support of the public interest pursuant to section 51 of the Act, which reads:

Duty of Commission on appearing	**Obligations de la Commission**
51 In appearing at a hearing, presenting evidence and making representations, the Commission shall adopt such position as, in its opinion, is in the public interest having	51 En comparaissant devant le membre instructeur et en présentant ses éléments de preuve et ses observations, la Commission adopte l'attitude la plus proche, à son avis, de

regard to the nature of the complaint.	l'intérêt public, compte tenu de la nature de la plainte.

[7] The scope of its participation was the subject of strenuous objection by Seaspan. However, in the end, and apart from finding in favour of Mr. Smolik on the merits of his complaint, the Tribunal held that the Commission was entitled to participate in the hearing in support of the public interest under section 51 of the Act; the Tribunal determined that the term "public interest" is not defined under the Act and that no legislation or jurisprudence narrowly restricts the participation of the Commission in human rights matters. Seaspan sought judicial review of the Tribunal's decision, thus the underlying application.

[8] Paragraph 303(1)(a) of the *Federal Courts Rules*, SOR/98-106 [Rules], provides that an applicant for judicial review must name as a respondent every person directly affected by the order sought:

Respondents	**Défendeurs**
303(1) Subject to subsection (2), an applicant shall name as a respondent every person	303(1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :
(a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought;	a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;
…	[…]

[9] Seemingly through inadvertence, Seaspan's initial application for judicial review failed to name the Commission as a respondent. On April 9, 2021, Prothonotary Kathleen Ring ordered that the Commission be added as a respondent to the underlying proceedings and granted

Seaspan permission to amend its notice of application for judicial review. In its amended application for judicial review, in addition to arguing that the Tribunal erred in its assessment of the evidence and in its decision that Seaspan discriminated against and did not reasonably accommodate Mr. Smolik, Seaspan seeks an order quashing the Tribunal's decision on the basis that the Commission's intervention before the Tribunal exceeded the bounds of appropriate behaviour of an administrative tribunal and that the Tribunal failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe by allowing the Commission to, in effect, adopt an advocacy role on behalf of Mr. Smolik.

[10] In accordance with section 310 of the Rules, every respondent to an application must file an application record containing a memorandum of fact and law:

Respondent's record	**Dossier du défendeur**
310(1) A respondent to an application shall, within 20 days after service of the applicant's record, serve and file the respondent's record.	310 (1) Le défendeur signifie et dépose son dossier dans les 20 jours après avoir reçu signification du dossier du demandeur.
…	[…]
Contents of respondent's record	**Contenu du dossier du défendeur**
(2) The record of a respondent shall contain, on consecutively numbered pages and in the following order,	(2) Le dossier du défendeur contient, sur des pages numérotées consécutivement, les documents suivants dans l'ordre indiqué ci-après :
…	[…]
(f) the respondent's memorandum of fact and law.	f) un mémoire des faits et du droit.

[11] In its memorandum, the Commission addressed not only the issues of discrimination, accommodation and undue hardship as found by the Tribunal, but also the issue raised by Seaspan as to the Commission's own participation before the Tribunal in accordance with its public interest mandate under section 51 of the Act. During the hearing before me, I enquired whether Seaspan was arguing that only parts of the Commission's memorandum of fact and law should be struck or whether it was to be struck in its entirety; Seaspan confirmed the latter. The issue therefore before me on the present motion is whether I should exercise my discretion and strike out in its entirety the Commission's memorandum filed in accordance with section 310 of the Rules. I am also mindful of the risk of tying the hands of the judge hearing the application in respect of any issue that may be raised by the parties.

III. Analysis

[12] I should first mention that Seaspan does not rely on section 221 of the Rules considering that such a section is found in Part 4 of the Rules – dedicated to actions – while the underlying application has been instituted under Part 5 of the Rules. Rather, Seaspan relies on the Court's inherent jurisdiction to strike a memorandum of fact and law, jurisdiction acknowledged by the respondents (see this Court's decision in *David Suzuki Foundation v Canada (Health)*, 2019 FC 1473 [*David Suzuki*], as well as the Federal Court of Appeal's decision in *Ermineskin First Nation v Canada*, 2006 FCA 423 [*Ermineskin First Nation*]).

[13] I should also mention that the underlying application does not relate to any decision made by the Commission on how it was to participate before the Tribunal pursuant to section 51 of the Act or how it exercised its discretion to do so.

[14] Seaspan argues that, when considered contextually, the Commission is acting as the Tribunal's wingman, participating in the underlying application in the stead of the Tribunal, which cannot participate directly, and that its memorandum exceeds the bounds of propriety for Tribunal participation by taking an active and aggressive role on the application for judicial review, thereby discrediting the impartiality of both the Tribunal and the Commission; Seaspan relies on *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 [*Ontario (Energy Board)*], in which the Supreme Court of Canada reviewed the role of administrative tribunals when acting as a party on appeal from their own decisions. Seaspan claims that the Commission, when referring a matter to the Tribunal pursuant to subsection 49(1) of the Act, is performing an adjudicatory function and is not acting in its regulatory capacity. Therefore, the Commission is being adversarial in these proceedings, going against the principles of finality and impartiality that govern administrative tribunals (*Canada (Attorney General) v Quadrini*, 2010 FCA 246 [*Quadrini*]). Seaspan submits that, in light of the application of the principles arising from *Ontario (Energy Board)* and *Quadrini*, the Commission, being tantamount to the Tribunal under the circumstances, can only offer its assistance to the Court on issues related to the appropriate standard of review and is not entitled to argue the reasonableness of any of the Tribunal's conclusion on the merits of the matter, including as regards the Tribunal's conclusions on the role of the Commission in the proceedings.

[15] It seems to me that the issue as to whether the principles set out in *Ontario (Energy Board*) and *Quadrini* – which by the way involve unique situations, unlike the case here, where administrative tribunals actually have the statutory right to appear before the Court on review of their own decisions – even apply in this case, given that the Commission is not the actual

adjudicative body which rendered the decision which is the subject matter of the underlying application for judicial review, is best left to be considered by the judge hearing the underlying application on the merits. Although the issue sought to be determined on the present motion is not the role of the Commission when appearing before the Tribunal – that is an issue in the underlying application – but rather the Commission's role and whether its memorandum is to be struck within the context of the underlying application itself, it seems to me that there is considerable overlap with the arguments made by Seaspan on the merits of the underlying application; the present motion is very much grounded upon common law principles regarding the proper participation of an administrative decision-maker in a judicial review application of its own decision.

[16] For my part, I do not accept Seaspan's argument that leaving this issue to the judge on the merits would be tantamount to closing the barn door after the horses have fled, nor have I been convinced that I should exercise my discretion and strike the Commission's memorandum; it would seem to me rather strange for the issues of the Commission's statutory function, role, mandate or duty that caused it to participate in the hearing before the Tribunal to be left, as suggested by Seaspan, to Mr. Smolik to address before the judge hearing the underlying application, in support of the Tribunal's decision; it seems to me that the Commission is the party best placed to address those issues and speak to the public interest drivers behind the position the Commission took before the Tribunal, to the degree necessary for the judge hearing the underlying application to fully consider the matter.

[17] I also do not believe that the decisions in *David Suzuki* and *Ermineskin First Nation* are of assistance to Seaspan; these are cases that dealt with the scope of participation of the party whose memorandum was sought to be struck on the grounds that the arguments raised therein went beyond such scope. In this case, the Commission is not an intervener in the underlying application, and the issue is not whether it exceeded the terms on which such intervention was granted, as was the case in *David Suzuki*. Nor is this a situation, as was the case in *Ermineskin First Nation*, where the contents of the memorandum are in contravention of an applicable statutory or regulatory provision, the rules of court or any order that may have been made in the proceedings. Here, the Commission is a proper respondent; it was a party before the Tribunal whose decision is the subject matter of the underlying application, and will be affected by the order sought by Seaspan in the underlying application. In fact, Seaspan itself sought to amend its own notice of application for judicial review to add the Commission as a respondent, without any objection or attempt to circumscribe the Commission's role as a party to the underlying application. I have not been shown any support for the proposition that I should exercise my discretion at this early stage and strike the memorandum of a respondent named as a party by an applicant which was filed in accordance with the Rules of this Court, and I see no need, nor any reason that it would be just, fair and equitable, to do so in this case.

IV. Costs

[18] As to costs, the Commission argues that the present motion was unnecessary, has unreasonably increased the time and resources expensed by the Commission to answer it, and has unreasonably lengthened the present proceedings; in short, the Commission argues that Seaspan has taken what amounts to a very simple issue with clear rules and settled principles and

turned it into something unnecessarily complex by raising issues that are, at best, irrelevant or duplicative. In addition, Seaspan's book of authorities was only received a couple of days prior to the hearing of the present motion rather than, as is more appropriate, at the time of receipt of its motion record, thus further increasing unnecessarily the time needed for the Commission to have to gather and review the case law submitted by Seaspan. The Commission therefore seeks increased costs, beyond what is called for in Column III of the table costs. For my part, it may well be that the principal issues raised by Seaspan in the present motion prove to have little substance; however, I have left those issues to be addressed by the judge hearing the application. In any event, in line with my discretion in the awarding of costs, I award costs payable by Seaspan to both the Commission and Mr. Smolik each in the lump sum amount of $2,500, payable forthwith notwithstanding appeal.

ORDER in T-551-21

THIS COURT ORDERS that:

1. The present motion to have the Court strike in its entirety the memorandum of fact and law of the co-respondent, the Canadian Human Rights Commission [Commission] is dismissed.

2. Costs are payable by Seaspan Marine Corporation to both the Commission and Mr. Andreas Smolik each in the lump sum amount of $2,500, payable forthwith notwithstanding appeal.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-551-21
STYLE OF CAUSE:	SEASPAN MARINE CORPORATION v ANDREAS SMOLIK and CANADIAN HUMAN RIGHTS COMMISSION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 16, 2021
ORDER AND REASONS:	PAMEL J
DATED:	AUGUST 30, 2022

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