Federal Court of Appeal | Cour d'appel fédérale

Date: 20220525

Docket: A-43-21

Citation: 2022 FCA 92

CORAM: **STRATAS J.A.**
LOCKE J.A.
MACTAVISH J.A.

BETWEEN:

PRAIRIES TUBULARS (2015) INC.

Appellant

and

CANADA BORDER SERVICES AGENCY, PRESIDENT CANADA BORDER SERVICES AGENCY and THE ATTORNEY GENERAL OF CANADA

Respondents

Heard at Ottawa, Ontario, on April 26, 2022.

Judgment delivered at Ottawa, Ontario, on May 25, 2022.

REASONS FOR JUDGMENT BY: LOCKE J.A.

CONCURRED IN BY: STRATAS J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

LOCKE J.A.

I. *Background*

[1] Between December 2016 and January 2017, the appellant, Prairies Tubulars (2015) Inc., imported oil country tubular goods (OCTG), types of pipe used in the oil industry, 22 times. Because OCTG are subject to anti-dumping duties under the *Special Import Measures Act*, R.S.C. 1985, c. S-15 (SIMA), the Canada Border Services Agency issued Detailed Adjustment Statements (DAS) in respect of the importations, which imposed duties totalling $18,829,412.40.

[2] In an earlier, related proceeding, the appellant sought judicial review before the Federal Court of the DAS that imposed the duties. However, its application was dismissed because an internal statutory appeal procedure exists under the SIMA, which excludes the jurisdiction of the Federal Court: see *Prairies Tubulars (2015) Inc. v. Canada (Border Services Agency)*, 2018 FC 991. The appellant acknowledged the existence of the statutory appeal procedure but claimed it was not able to invoke it because it could not meet the prerequisite of paying the outstanding duties. Specifically, in this case, paragraphs 56(1.01)(a), 56(1.1)(a), 58(1.1)(a), and 58(2)(a) (Appeal Payment Provisions) require the appellant to pay the duties in issue before various administrative actors can hear appeals. The appellant is of the view that these provisions operate as “pay-to-play” provisions and, for impecunious parties who cannot pay the duties, this means that they cannot pursue their administrative appeals and, ultimately, access the Federal Court on review.

[3] The Federal Court found (at paras. 39 and 46) that it could not address the appellant's argument based on its inability to pay the duties because the SIMA ousted the Federal Court's jurisdiction to review the issuance of the DAS. Instead, the appellant was directed to challenge the SIMA on constitutional grounds, which it had not done.

[4] The appellant then amended its notice of application to challenge the constitutionality of the Appeal Payment Provisions. The appellant argued that the provisions in issue are invalid on three grounds:

i. They violate sections 96 to 101 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5, by barring access to the courts in a manner that is inconsistent with the rule of law;

ii. They violate section 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (*Charter*), by subjecting the appellant and similarly situated individuals to cruel and unusual treatment; and

iii. They violate subsection 1(a) of the *Canadian Bill of Rights*, S.C. 1960, c. 44 (*Bill of Rights*), by prohibiting individuals similarly situated to the appellant from accessing the fair hearing rights protected by subsection 2(e) thereof.

[5] The Federal Court considered each of these arguments but dismissed the appellant's application (2021 FC 36, *per* Ahmed J.). That decision is under appeal here.

[6] The appellant no longer pursues the argument that the Appeal Payment Provisions violate section 12 of the *Charter*, but it does pursue arguments that rely on violations of (i) sections 96 to 101 of the *Constitution Act, 1867*, and (ii) the *Bill of Rights*. These arguments are addressed in the paragraphs below.

[7] First, I note that the standard of review is as outlined in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: correctness on questions of law, and palpable and overriding error on questions of fact or of mixed fact and law in which there is no extricable issue of law.

II. *Sections 96 to 101 of the Constitution Act, 1867*

[8] The basis of this argument is that sections 96 to 101 of the *Constitution Act, 1867*, which provide for the creation of provincial and federal courts, prevent the provincial and federal legislatures from blocking access to the courts by parties seeking judicial review of administrative decisions: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 31. As stated in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1 at page 230 S.C.R., "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice."

[9] The appellant argues that the Federal Court erred in relation to the constitutional right to access the courts for judicial review. It is not necessary to address all of these arguments. It is sufficient to address the reasons provided by the Federal Court.

[10] The Federal Court stated, and I agree, that the rule of law, as an unwritten constitutional principle, is not capable, by itself, of invalidating legislation: see also *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, 462 D.L.R. (4th) 1. To find otherwise would give rise to the danger mentioned by the Federal Court at paragraph 42 of its reasons: that the rule of law would assume the same authority as a written constitutional provision. I also agree with the Federal Court's conclusion that the rule of law is "the logic underlying the Constitution – not the Constitution itself."

[11] The appellant primarily relies on the Supreme Court's decision in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31 (*Trial Lawyers*). In that decision, the Supreme Court of Canada found that court hearing fees did not interfere with the Court's jurisdiction under sections 96 to 101 of the *Constitution Act, 1867* unless they deprived litigants of access to the courts. This results "when the hearing fees in question cause undue hardship to the litigant who seeks the adjudication of the superior court" (see *Trial Lawyers* at para. 45). By "undue hardship", I understand hardship over and above the legitimate purposes of the provision.

[12] Therefore, the parties agree that a key question in this case is whether the pay-to-play requirement caused an undue hardship to the appellant. The appellant argues that the amount of the outstanding duties (over $18 million) is such that the Federal Court should have found undue hardship. On this point, the Federal Court noted the following:

- The duties are remedial, and not punitive (paragraph 49);

- They are proportionate to the margin of dumping (paragraph 53);

- They would be returnable if the appellant were ultimately successful upon redetermination or appeal (paragraph 49);

- The appellant chose to import the OCTG with the knowledge of its obligations under the SIMA and the duties that would flow therefrom (paragraph 50);

- The appellant's evidence concerning hardship was unpersuasive in view of the large amount of its gross earnings (nearly $90 million for the fiscal years ending March 2017 and 2018) and the lack of documentary support for its claim that its net earnings were limited (paragraphs 45 and 46).

[13] I see no error in the Federal Court's analysis in this regard. The appellant argues that the Federal Court (at paragraph 46 of its reasons) confused the appellant's gross earnings with its net earnings. I see no indication of confusion. Rather, the Federal Court expressed that the appellant's evidence was insufficient. This was a factually suffused finding, which is reviewable only in the event of a palpable and overriding error. I see no such error.

[14] The appellant argues that the Federal Court erred by drawing an adverse inference against the appellant because of its refusal to permit its principal, Charles Zhang, to answer questions during cross-examination about the financial situation of companies related to the appellant. However, I see no indication that the Federal Court drew such an inference.

[15] The appellant also argues that the Federal Court erred by disregarding the affidavit of Flora Lee on the sole basis that it was submitted after the deadline for submission of evidence. I see no error here either. The affidavit was late, and the appellant never made a motion to have its lateness excused. The Federal Court was entitled to disregard it. Moreover, the content of the affidavit concerns exchanges of communication between counsel. It is not at all clear what part of it could not be submitted to this Court as argument.

[16] The appellant further argues that, even if the evidence was insufficient to convince the Federal Court that the amount of duties payable caused undue hardship to the appellant, the Appeal Payment Provisions should have been struck under the "reasonable hypothetical doctrine". This doctrine focuses on whether there is a reasonably foreseeable situation where the legislation would violate the Constitution. Unfortunately, the appellant does not explain this argument in sufficient detail to establish any particular reasonably foreseeable scenario that would give rise to undue hardship.

[17] The discussion above is sufficient to dismiss the appellant's argument based on sections 96 to 101 of the *Constitution Act, 1867*. For that reason, it is not necessary to address two arguments made by the respondents that the pay-to-play regime provided for in the SIMA does not violate sections 96 to 101. The first argument is that sections 96 to 101 concern access to the courts, whereas the SIMA limits access to an administrative tribunal. The respondents argue that *Trial Lawyers* concerned access to the courts, and does not come into play in this case. The second argument is that a violation of sections 96 to 101 does not arise because the pay-to-play regime effects a partial, not a complete, ouster of judicial review. Relying upon *Canada*

(Citizenship and Immigration) v. Canadian Council for Refugees, 2021 FCA 72, 458 D.L.R. (4th) 125 at paragraph 102, a unanimous decision of this Court, the respondents say that our law does not forbid partial restrictions on access to courts for judicial review. There are certainly many partial restrictions on access to courts for judicial review, some caused by limitations on access to or the admissibility of evidence, and others by statutory provisions that require leave to appeal before leave is sought or that restrict what can be raised on a judicial review: see, *e.g.*, *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 72(1) (leave required before judicial review under the Act is brought in the Federal Court); *Canada Transportation Act*, S.C. 1996, c. 10, s. 41(1) (review only on the basis of "law" or "jurisdiction"). The respondents say that our law forbids only complete immunization of an administrator from any review whatsoever, which is plainly not the case here: *Canadian Council for Refugees* at para. 105, citing *Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132 at paras. 23-24.

[18] Because of the failure of the appellant to adduce sufficient evidence to establish hardship or impecuniosity, it is also unnecessary to opine definitively on whether the pay-to-play regime respects the methodology set out in paragraphs 51 and 52 of *Trial Lawyers* (to consider the purposes of the regime and whether the Appeal Payment Provisions go beyond those purposes in limiting access to the courts). I would simply note that the pay-to-play provisions do fulfil one very important purpose: to ensure that the duties that may be owing be paid in advance to prevent collection issues later concerning importers outside the country who may be difficult to pursue for payments later.

III. *Bill of Rights*

[19] The appellant relies on subsections 1(a) and 2(e) of the *Bill of Rights*. Subsection 1(a) guarantees "the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law." Subsection 2(e) provides that "no law of Canada shall be construed or applied so as to … deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations."

[20] The appellant argues that it was denied a fair hearing in that an adjudicative process is provided for in the SIMA, but it could not access that process (including the attendant fair hearing) because of the pay-to-play regime.

[21] The appellant concedes that it is not an "individual", and therefore it does not benefit from the guarantee contemplated in subsection 1(a) of the *Bill of Rights*. The appellant argues instead that the Federal Court should have granted it public interest standing to argue that the Appeal Payment Provisions violate the *Bill of Rights*. The Federal Court considered this but rejected the appellant's argument on the basis that, though two of the relevant factors for public interest standing favoured the appellant (it has a genuine stake in the claim, and the claim is a reasonable and effective way to bring the issue before the courts), the third (a serious justiciable issue) weighed strongly against granting public interest standing. The Federal Court examined the relevant jurisprudence (including *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176 at paras. 116 and 120 (*Kazemi*); and *Authorson v. Canada (Attorney*

General), 2003 SCC 39, [2003] 2 S.C.R. 40 at paras. 58-61 (*Authorson*)) and concluded that the *Bill of Rights* clearly does not create a self-standing right to a fair hearing where the law does not otherwise allow for an adjudicative process. It merely offers protection if and when a hearing is held. I agree.

[22] The appellant argues that subsection 1(a) of the *Bill of Rights* should afford an individual quasi-constitutionally protected access to statutorily created federal tribunals (see paragraphs 83 and 85 of the appellant's memorandum of fact and law). Thereby, the appellant seeks to give subsection 1(a) "substantive teeth". It acknowledges that subsection 1(a) "has never been given substantive teeth," but goes on to argue what subsection 1(a) should do: what section 96 does for courts, but for administrative tribunals. I agree with the Federal Court and the respondents that "adding teeth" as the appellant seeks would require compelling reasons, which are not present in this case. Extreme caution should be exercised in importing substance into the due process guarantees of the *Bill of Rights*: *Curr v. The Queen*, [1972] S.C.R. 889, 26 D.L.R. (3d) 603 at p. 902 S.C.R.; *Authorson* at para. 49. It has been held generally that the procedural protections of the *Bill of Rights*, such as subsection 2(e), protect only matters of procedure, not substance: *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, [2013] 3 S.C.R. 866 at para. 61; *Kazemi* at paras. 119-120; see also *Goodman v. Canada (Public Safety and Emergency Preparedness)*, 2022 FCA 21 at para. 6.

[23] I see no error in the Federal Court's analysis of the question of the alleged violation of the *Bill of Rights* by the Appeal Payment Provisions.

IV. *Conclusion*

[24] Before concluding, I would note that subsection 57(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, requires as follows:

> If the constitutional validity, applicability or operability of an Act of Parliament … is in question before the Federal Court of Appeal … the Act … shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).

Subsection 57(2) requires that the contemplated notice be served "at least 10 days before the day on which the constitutional question is to be argued, unless the Federal Court of Appeal … orders otherwise."

[25] Shortly before the hearing, it was noted that, though a notice of constitutional question was served when the matter was before the Federal Court, no such notice was served concerning the appeal to this Court. This omission was addressed by directing that the notice be served after the hearing. The hearing took place as planned and was then adjourned in case any attorney general opted to intervene within the contemplated 10-day period. None did.

[26] For the reasons set out above, I would dismiss the appeal with costs.

"George R. Locke"
J.A.

“I agree.
David Stratas J.A.”

“I agree.
Anne L. Mactavish J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	STRATAS J.A. MACTAVISH J.A.
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