CITATION: Clean Train Coalition Inc. v. Metrolinx, 2012 ONSC 6593
DIVISIONAL COURT FILE NO.: 380/12
DATE: 20121121

2012 ONSC 6593 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO
(DIVISIONAL COURT)

RE: CLEAN TRAIN COALITION INC. v. METROLINX

BEFORE: Justices Kiteley, Swinton and Pomerance

COUNSEL: Saba Ahmad and Marilyn Lee, for the Applicant

John B. Laskin and Myriam Seers, for the Respondent

HEARD AT TORONTO: November 19, 2012

E N D O R S E M E N T

Swinton J.:

Overview

[1] The applicant, the Clean Train Coalition Ltd., seeks judicial review of a decision of the respondent Metrolinx to enter into a contract to purchase diesel multiple units ("DMUs") from a supplier. The DMUs are to be used on an air-rail link between Toronto's Union Station and Pearson Airport.

[2] For the reasons that follow, I would dismiss the application for judicial review.

Background

[3] When the air-rail link project commenced, around 2003, Metrolinx had oversight and supervisory responsibility for the project, but was not responsible for implementation.

[4] Metrolinx initiated an environmental assessment in 2008-09, which was conducted on the basis that diesel trains would be used. The process culminated in a Notice to Proceed issued by the Ontario Minister of the Environment in October 2009. The Minister imposed certain conditions, including the requirement that the diesel units used on the air-rail link be Tier 4 compliant, thus meeting the strictest emission standards for diesel issued by the United States Environmental Protection Agency. The DMUs contemplated by the contract in issue will use Tier 4 technology and can, at some point, be converted to electricity.

[5] In 2009, the completion of the air-rail link in time for the PanAm games in July 2015 became a key strategic priority for the provincial government.

[6] In July 2010, the Minister of Transportation transferred operational responsibility for the air-rail link project to Metrolinx, on consent. Metrolinx agreed to have the link in operation by the spring of 2015, in order to provide service for the PanAm games.

[7] In November, 2010, the Board of Directors of Metrolinx authorized its staff to enter into negotiations with a supplier of DMUs. In February, 2011, the Board authorized the execution of a contract with the supplier, and the contract was executed on March 31, 2011.

[8] The applicant argues that Metrolinx exceeded its jurisdiction in entering the supply contract for DMUs, as it failed to first conduct a feasibility study with respect to electrification of the air-rail link. As well, Metrolinx is said to have improperly accepted the direction of the Minister of Transportation in opting to proceed with diesel service and to meet a completion target of 2015.

Analysis

[9] The applicant seeks to quash the decision of Metrolinx, which is relief in the nature of certiorari.

[10] Subsection 2(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (the "JRPA") permits the court to exercise judicial review in circumstances where there has been an exercise or refusal to exercise a "statutory power of decision", as defined in s. 1, or the applicant would be entitled to seek relief in the nature of mandamus, prohibition or certiorari.

[11] A "statutory power of decision" is defined as a decision deciding or prescribing the legal rights, powers, or privileges of a party. The requirements for certiorari have traditionally been similar, so that it lies when a public body has the power to decide any matter affecting a person's rights, interests, property, privileges or liberty (*Dolan v. Ontario (Civilian Commission on Police Services)*, 2011 ONSC 1376 (Div. Ct.) at para. 84).

[12] Metrolinx argues that its decision to enter the contract is not subject to judicial review, because the decision did not decide or prescribe any legal rights, powers, privileges, immunities, duties or liabilities of any person or party. Therefore, pursuant to s. 2(1) of the JRPA, the Court cannot provide the relief sought by the applicant.

[13] The applicant argues that the decision affects legal rights because the preamble of the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28 ("EBR") recognizes the right to a healthy environment. However, the preamble does not confer any legal right. Moreover, s. 2(1)(c) of the EBR limits its purposes to protecting the right to a healthful environment "by the means provided by this Act." The EBR provides specific mechanisms to address environmental complaints, which do not include judicial review.

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[14] The applicant also submits that the Metrolinx decision determines "powers." I disagree. The decision under attack is the resolution of the Board of Directors to authorize execution of a contract in the absence of a feasibility study respecting electrification. Nowhere in that resolution does the Board decide the powers of any person or party, nor is it determining the scope of its own powers.

[15] The decision in *Kipiniak v. Ontario Judicial Council*, 2012 ONSC 5866 (Div. Ct.) is distinguishable. At para. 16 of that decision, the Divisional Court noted that there is a specific statutory duty to investigate a complaint and a specific regime for handling complaints. There is no analogous statutory duty here.

[16] In our view, the present case is governed by *PC Ontario Fund v. Essensa*, 2012 ONCA 453 at para. 12. Metrolinx's decision to enter the contract for the supply of the DMUs did not determine legal rights and was not the exercise of a statutory power of decision. To hold otherwise would be to torture the statutory definition.

[17] However, even if this were a case where relief in the nature of certiorari might be available, the applicant's argument that Metrolinx exceeded its jurisdiction is without merit. Metrolinx decided to accept responsibility for implementing the air-rail link at the request of the Minister of Transportation. It accepted that responsibility knowing of the 2015 deadline for completion in order to provide service for the PanAm games and knowing that DMUs would initially be used on the line. Subsection 19(1) of the *Metrolinx Act, 2006*, S.O. 2006, c. 16 gives Metrolinx the power to enter into agreements with the Crown for a purpose consistent with its objects. One of its objects, in s. 5(1)(c), is to be responsible for the operation of the regional transit system and the provision of other transit systems. The air-rail link is an extension and expansion of the regional transit system and a priority in Metrolinx's transportation plan, *The Big Move*.

[18] Moreover, in exercising its leadership in the planning, development and implementation of the regional transportation network, Metrolinx is required to comply with provincial transportation plans and policies as they apply to the regional transportation area (s. 5(1)(a)(ii)). Subsections 31(1) and 31(1.1) of the Act, allowing the Minister to provide directives or policy statements, do not preclude Metrolinx from agreeing to accept a project like the air-rail link from the province.

[19] In addition, the Memorandum of Understanding ("the MOU") between Metrolinx and the Minister of Transportation provides that the Minister "establishes strategic directions and Government priorities, and develops legislation, regulations, standards, policies and directives" (Article 2.3).

[20] Given the statutory framework and the terms of the MOU, Metrolinx acted within its authority in agreeing to take over the implementation of the air-rail link project, using diesel, with a projected end date of 2015.

Conclusion

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[21] Accordingly, the application for judicial review is dismissed.

[22] Each of the parties provided bills of costs seeking costs on a partial indemnity basis. Metrolinx sought $60,000 for the application, while the applicant sought over $110,000.

[23] The applicant's bill of costs provides some measure of what the losing party might expect to pay. However, the amount sought by Metrolinx is beyond the normal range for a one day application before this Court, even where there have been cross-examinations and the stakes are important to the parties. Accordingly, Clean Train Coalition Inc. shall pay costs of the application to Metrolinx in the amount of $30,000 inclusive of HST and disbursements, an amount that is fair and reasonable for a case such as this, as well as costs of the motion before Lax J. of $3,500, which she ordered in the cause.

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Swinton J.

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Kiteley J.

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Pomerance J.

Released: November 21, 2012

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CORRIGENDUM

Swinton J.:

[1] The Endorsement of November 21, 2012 is to be corrected as follows:

In the fourth line of paragraph 23, the word "Air" is not correct. It has been corrected to the proper word of "Train".

Released: November 21, 2012