Federal Court of Appeal | Cour d'appel fédérale

Date: 20160615

Docket: A-215-14

Citation: 2016 FCA 180

CORAM: **TRUDEL J.A.**
STRATAS J.A.
BOIVIN J.A.

BETWEEN:

GARY HENNESSEY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at St. John's, Newfoundland and Labrador, on June 7, 2016.

Judgment delivered at Ottawa, Ontario on June 15, 2016.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: TRUDEL J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The appellant appeals from the judgment dated March 24, 2014 of the Federal Court (*per* Barnes J.): 2014 FC 286. In lengthy, detailed and careful reasons, the Federal Court dismissed the appellant's action for damages arising from the alleged conduct of certain officials employed by the Canada Revenue Agency.

[2] After a fourteen day trial, the Federal Court found on the evidence that none of the causes of action put to it were established. In particular, the Federal Court found that the Canada Revenue Agency officials did not act maliciously and unlawfully or violate the appellant's Charter rights when they tried to collect payroll remittance arrears from him.

[3] Just after the appeal hearing began, we acquainted the appellant, who was representing himself, with the law concerning the appellate standard of review. We encouraged him to identify errors of law or palpable and overriding errors in the reasons of the Federal Court.

[4] The appellant failed to do so. For the most part, he urged us to reweigh the evidence and come to findings different from those made by the Federal Court. This, as an appeal court, we cannot do: see, *e.g.*, *AstraZeneca Canada Inc. v. Apotex Inc.*, 2011 FCA 211, 425 N.R. 133 at para. 8; *Hershkovitz v. Tyco Safety Products Canada Ltd.*, 2010 FCA 190, 405 N.R. 185 at para. 39.

[5] As is well-known, absent an error of law or an error in principle at the root of a finding of mixed law and fact, a judgment of the Federal Court dismissing an action can be set aside only if palpable and overriding error is shown: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Palpable and overriding error is a difficult, rarely-met standard:

> "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

(Canada v. South Yukon Forest Corporation, 2012 FCA 165, 431 N.R. 286 at para. 46.)

[6] The appellant did not identify any errors of law or any extricable errors in principle underlying a finding of mixed law and fact made by the Federal Court. In my view, the reasoning of the Federal Court contains no such errors. The Federal Court did not misstate or misapply the law or any legal principles.

[7] Further, the Federal Court did not commit any palpable and overriding errors. All of its factual findings and findings on factually-suffused questions of mixed fact and law were supportable on the evidence before it.

[8] Before us, the appellant seemed to suggest that the Federal Court ignored some of the evidence before it or gave inadequate reasons for the findings it made. I disagree.

[9] Unless persuaded otherwise, an appellate court, such as this Court, must presume that a first-instance court has considered all of the evidence placed before it: *Housen*, above at para. 46. In the case before us, the appellant has not rebutted this presumption.

[10] Further, reasons for judgment need only be adequate, not an encyclopedic description of every last morsel of evidence offered by the parties. This is especially true in long trials, such as this one. I adopt the reasoning in the following passage from *South Yukon* (at paras. 49-51) and find it wholly apposite to the case before us:

> Immersed from day-to-day and week-to-week in a long and complex trial such as this, trial judges occupy a privileged and unique position. Armed with the tools of logic and reason, they study and observe all of the witnesses and the exhibits. Over time, factual assessments develop, evolve, and ultimately solidify into a factual narrative, full of complex interconnections, nuances and flavour.

> When it comes time to draft reasons in a complex case, trial judges are not trying to draft an encyclopedia memorializing every last morsel of factual minutiae, nor can they. They distill and synthesize masses of information, separating the wheat from the chaff and, in the end, expressing only the most important factual findings and justifications for them.
>
> Sometimes appellants attack as palpable and overriding error the non-mention or scanty mention of matters they consider to be important. In assessing this, care must be taken to distinguish true palpable and overriding error on the one hand, from the legitimate by-product of distillation and synthesis or innocent inadequacies of expression on the other.

[11] In another case, this Court put it this way:

> We are not to insist that courts explicitly address every last issue, set out the obvious or show how they arrived at their conclusion in a "watch me think" fashion: *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 at paragraphs 17 and 43-44; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788 at paragraph 25; *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245 at paragraph 27. Instead, we are to adopt a very practical and functional approach to the adequacy of reasons: see, *e.g.*, *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869 at paragraph 55; *R.E.M.*, above at paragraph 35; *Hill v. Hamilton-Wentworth Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 at paragraph 101. Reasons must be read as a whole in their overall context, including the evidentiary record before the court, the submissions made, the issues that were live before the court and the fact that judges are presumed to know the law on basic points: *R.E.M.*, above at paragraphs 35 and 45. The main concern is whether the reasons, short as they may be, are intelligible or capable of being made out and permit meaningful appellate review: *Sheppard*, above at paragraph 25; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621; *R.E.M.*, above at paragraph 35.

(*Canada v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209 at para. 143.)

[12] The reasons of the Federal Court easily satisfy these tests. Far from being deficient, they are a model of clarity, containing clear factual findings, including firm findings concerning the credibility of the appellant as a witness. It supported these findings with plenty of detail and ample explanation.

[13] The appellant also alleges that the Federal Court was biased. He bases this allegation in part upon evidence he unsuccessfully sought to introduce into this appeal by way of interlocutory motion earlier this year. That evidence consisted of certain words allegedly spoken by the Federal Court during the hearing and a suggestion that the audio tape of the hearing was edited to remove the words. This Court dismissed the motion. The appellant has not sought leave to appeal that motion. Thus, as matters stand, the appellant's allegation of bias cannot rely upon that evidence.

[14] However, even if the interlocutory motion had been allowed and we considered the evidence the appellant proffers, I would still dismiss his allegation of bias.

[15] The test for bias is what a reasonable, right-minded, "informed person, viewing the matter realistically and practically—and having thought the matter through—conclude": *Committee for Justice and Liberty v. National Energy Board* (1976), [1978] 1 S.C.R. 369 at page 394, 68 D.L.R. (3d) 716; *Trevor Nicholas Construction Co. v. Canada (Minister for Public Works)*, 2003 FCA 277, 242 F.T.R. 317 at para. 8. Here, that test is not met.

[16] The appellant says (at para. 35 of his Memorandum of Fact and Law) that on the first day of trial the Federal Court pointedly asked his counsel where the evidence supporting a "big conspiracy" was. Assuming the Federal Court said those words, they must be seen in context.

[17] The Federal Court—mindful of the need under Rule 3 of the *Federal Courts Rules*, S.O.R./98-106 for proceedings to be prosecuted expeditiously and efficiently—had every right to

ask that sort of question. The reasonable, right-minded, informed person would not view those words as expressing pre-judgment of the appellant's case. Rather, that person would see them as an intervention aimed at encouraging the appellant to get to the real issues in dispute. Assuming the Federal Court said the words alleged, they were an instance of good trial management, not bias.

[18] The appellant also suggests (again at para. 35 of his Memorandum of Fact and Law) that the Federal Court showed bias in expressing its frustration after several days of evidence that it had not seen any evidence supporting the appellant's case. Again, viewed from the perspective of the reasonable, right-minded, informed person, this was a comment directed at encouraging the appellant to adduce relevant evidence and get to the point if there was a point to be made. This too was an instance of good trial management, not bias.

[19] The appellant also says that the Federal Court was biased because it did not assist it in getting contact information for an officer with the Canada Revenue Agency. This is a ruling against a specific request made by the appellant, not an instance of bias against his case.

[20] All these allegations of bias and unfairness fail for another reason. It is well-known that allegations of bias and procedural unfairness in a first-instance forum cannot be raised on appeal or judicial review if they could reasonably have been the subject of timely objection in the first-instance forum, here the Federal Court: *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191, [2001] 4 F.C. 85; *In Re Human Rights Tribunal and Atomic Energy*

of Canada, [1986] 1 F.C. 103 (C.A.) at page 113; *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, 373 D.L.R. (4th) 167 at paras. 67-68.

[21] A party must object when it is aware of a procedural problem in the first-instance forum. It must give the first-instance decision-maker a chance to address the matter before any harm is done, to try to repair any harm or to explain itself. A party, knowing of a procedural problem at first instance, cannot stay still in the weeds and then, once the matter is in the appellate court, pounce.

[22] If there were instances of bias or unfairness in the Federal Court, the appellant's counsel should have objected. The transcript shows no objection to anything the appellant now raises on appeal.

[23] At the outset of the appeal hearing, the appellant sought an adjournment. The appellant said he needed an adjournment in order to apply for leave to appeal to the Supreme Court of Canada from the decision on the interlocutory motion. He placed before us a copy of an email suggesting that he had made inquiries of a legal assistance group to assist him in that application.

[24] This Court refused to exercise its discretion in favour of adjourning the hearing. Where possible, appeals are to be prosecuted expeditiously: *Federal Courts Rules*, above, Rule 3. Early last autumn, at the appellant's request, the appeal hearing had been adjourned several months. Recently, the appellant sought an adjournment. It was refused. To some extent, the latest adjournment request is an instance of impermissible re-litigation.

[25] Further, the specific reason offered by the appellant for this particular adjournment request—the need to appeal the interlocutory motion to the Supreme Court and the possible assistance of a legal assistance group—does not bear scrutiny. The interlocutory motion should have been brought months earlier, namely at the time the appellant prepared the appeal book. Further, the time for applying for leave to appeal from this Court's dismissal of the motion has expired. The legal assistance group has not committed to assist the appellant. Finally, as can be seen from paragraphs 14-17 and 20-22, above, even if the interlocutory motion had succeeded and the Federal Court's words were admitted before us, the allegation of bias based on those words would still have been rejected and the result of this appeal would still be the same.

[26] The appellant also submits that the Federal Court's costs award should be set aside. In exercising its discretion on costs, the Federal Court applied proper legal principle and made an award supportable on the facts of the case. There are no grounds to set it aside.

[27] Overall, I conclude that there are no grounds for interfering with the Federal Court's judgment. Therefore, I would dismiss the appeal with costs.

"David Stratas"

J.A.

"I agree
Johanne Trudel J.A."

"I agree
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-215-14
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE BARNES DATED MARCH 24, 2014, NO. T-953-10	
STYLE OF CAUSE:	GARY HENNESSEY v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	ST. JOHN'S, NEWFOUNDLAND AND LABRADOR
DATE OF HEARING:	JUNE 7, 2016
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	TRUDEL J.A. BOIVIN J.A.
DATED:	JUNE 15, 2016

APPEARANCES:

Gary Hennessey	ON HIS OWN BEHALF
Caitlin Ward Maeve Baird	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT