Federal Court of Appeal | Cour d'appel fédérale

Date: 20170519

Docket: A-118-17

Citation: 2017 FCA 106

CORAM: **PELLETIER J.A.**
TRUDEL J.A.
RENNIE J.A.

BETWEEN:

THE HONOURABLE FRANCIS J.C. NEWBOULD

Applicant (Appellant)

and

ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

Heard at Ottawa, Ontario, on May 16, 2017.

Judgment delivered at Ottawa, Ontario, on May 19, 2017.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

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

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REASONS FOR JUDGMENT

PELLETIER J.A.

I. INTRODUCTION

[1] This is an appeal by the Honourable Mr. Justice Francis Newbould (the appellant) from the dismissal of his motion for a stay of a decision of the Judicial Conduct Review Panel (the Review Panel) dated February 10, 2017 constituting an Inquiry Committee to inquire into his conduct. In effect, the appellant seeks to prevent the continuation of the Canadian Judicial

Council (CJC) proceedings investigating his conduct until such time as his application for judicial review of the Review Panel's decision is decided. In reasons reported as 2017 FC 326, the Federal Court dismissed the motion on the grounds that it was premature and, in the alternative, that he had not satisfied the irreparable harm portion of the tripartite test set out in *RJR—MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311 at 334, 111 D.L.R. (4th) 385 [*RJR—MacDonald*].

[2] For the reasons set out below, I would dismiss the appeal.

II. FACTS

[3] In late 2014, the CJC received a number of complaints about the appellant's involvement in a public controversy regarding an aboriginal land claim in the vicinity of a cottage property owned by his family. The Chairperson of the CJC's Judicial Conduct Committee, Chief Justice MacDonald, after reviewing these complaints and the submissions of the appellant, closed the files while communicating to the appellant his concerns about the latter's conduct. This outcome is contemplated by section 5.1 of the CJC's *Procedures for the Review of Complaints or Allegations about Federally Appointed Judges* (the *2014 Review Procedures*).

[4] Six months later, one of the complainants, the Indigenous Bar Association, requested reconsideration of the decision to take no further action with respect to its complaint. Chief Justice MacDonald deferred the reconsideration request to the next most senior judge on the Judicial Conduct Committee, Senior Associate Chief Justice Pidgeon. In a decision dated May 5,

2016, Pidgeon S.A.C.J. decided to forward the matter to a Review Panel to determine whether an Inquiry Committee should be constituted.

[5] In response to an invitation to make submissions to the Review Panel, the appellant provided submissions as did his chief justice, Chief Justice Smith of the Ontario Superior Court of Justice. In her letter Chief Justice Smith raised the question as to whether the *2014 Review Procedures* in force at the time the original complaints were received or the subsequent revision of those procedures (the *2015 Review Procedures*) provided for reconsideration at all, or by someone other than the original decision maker.

[6] Before the Review Panel advised him of its decision, the appellant wrote to the Minister of Justice resigning from his office as judge effective June 1, 2017.

[7] In a decision dated February 10, 2017, the Review Panel concluded that the CJC had jurisdiction to reopen the Indigenous Bar Association's complaint. It went on to constitute an Inquiry Committee as provided in section 63(3) of the *Judges Act*, R.S.C 1985 c. J-1 (the Act) and subsection 2(4) of the *Canadian Judicial Council Inquiries and Investigations By-laws, 2015*, SOR/2015-203.

[8] The appellant applied for judicial review of that decision, seeking a declaration that the CJC had no jurisdiction to reconsider Chief Justice MacDonald's decision and an order prohibiting the CJC from taking any further steps concerning the complaints disposed of by Chief Justice MacDonald. In his notice of application he alleges that Pidgeon S.A.C.J. had no

jurisdiction to reconsider the decision of Chief Justice MacDonald in relation to the same subject matter and therefore, Pidgeon S.A.C.J. had no jurisdiction to refer the matter to a review panel. As a result, the Review Panel was itself without jurisdiction to constitute an Inquiry Committee.

[9] In the interim, the appellant moved for an order staying the decision of the Review Panel pending the outcome of his application for judicial review. That motion was heard by Mr. Justice Boswell of the Federal Court.

III. THE DECISION UNDER REVIEW

[10] After setting out the facts and the parties' submissions, the Federal Court set out the issues which it was called upon to decide:

1. Was the application for judicial review of the Review Panel's decision premature?
2. Should the Review Panel's decision constituting an Inquiry Committee be stayed pending the outcome of the judicial review?

[11] The Federal Court began its analysis of the prematurity issue by referring to a decision I wrote as a single judge of this Court sitting on motions, *Groupe Archambault v. CMRRA/SODRAC Inc.*, 2005 FCA 330, 357 N.R. 131 [*Groupe Archambault*] in which I stated at paragraph 7: "Before addressing the conditions for issuing an interlocutory stay of proceedings, the Court must be satisfied that its intervention is warranted under the circumstances." Following my review of the circumstances, I dismissed the motion for a stay before considering the *RJR—McDonald* test for an injunction or a stay of proceedings.

[12] In light of this authority, the Federal Court reviewed the law as to prematurity and adequate alternate remedies, quoting at length from this Court's decision in *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332. The Federal Court was of the view that there were no extraordinary circumstances that would justify interfering with the ongoing administrative proceedings until they were completed or until all effective available remedies were exhausted.

[13] The Federal Court referred to the case of *Girouard v. Inquiry Committee Constituted Under the Procedures for Dealing With Complaints Made to the Canadian Judicial Council About Federally Appointed Judges*, 2014 FC 1175, [2014] F.C.J. No. 1360 (QL) [*Girouard*]. In that case, the Federal Court struck a notice of application brought by a federally appointed judge seeking judicial review of a Review Panel decision to constitute an Inquiry Committee. The Federal Court did so on the basis that the application for judicial review was premature: see *Girouard* at para. 17. In the course of discussing *Girouard*, the Federal Court commented that the Attorney General had not brought a motion to strike out the underlying application for judicial review. In the result, the Federal Court dismissed the application for a stay on the basis that it was premature. Given that there was no motion before it seeking the striking out of the application for judicial review, it did not do so.

[14] In the event that this Court did not agree with its view as to prematurity, the Federal Court addressed the merits of the motion for a stay. As is well known, the elements of the tri-partite test in *RJR—MacDonald* are:

1. A serious question to be tried; (serious issue)
2. Irreparable harm if the relief is not granted; and (irreparable harm)

3. The balance of convenience.

RJR—MacDonald at 343

[15] In this case, the Federal Court found that the application for judicial review raised a serious issue and that it was neither frivolous nor vexatious.

[16] On the issue of irreparable harm, the Federal Court found that any harm to the appellant's reputation had conceivably already occurred as a result of media coverage of his participation in the public controversy in relation to the aboriginal land claim. The Federal Court found that irreparable reputational harm could not be proven by unsubstantiated allegations; in the Court's view, irreparable harm could only be established by clear and compelling evidence. The Federal Court found that there was no evidence that any harm suffered by the appellant would be irreparable.

[17] Given that the tri-partite test is conjunctive, the Federal Court did not go on to consider the balance of convenience since the appellant's motion for a stay failed on the issue of irreparable harm.

IV. STATEMENT OF ISSUES

[18] The issues considered by the Federal Court are the issues in this appeal. The question as to whether prematurity is a preliminary issue which must be decided prior to consideration of the tri-partite test is challenged by the appellant as is the Federal Court's conclusion that no reputational damage amounting to irreparable harm has been shown here.

V. STANDARD OF REVIEW

[19] This is an appeal of a discretionary decision of a judge of the Federal Court. As a five-member panel of this Court found in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at paragraph 79, 402 D.L.R. (4th) 497, the standard of review in such a case is the appellate standard identified in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: correctness for questions of law and palpable and overriding error for questions of fact and questions of mixed fact and law, save where an extricable question of law can be identified.

VI. PREMATURITY

[20] In *RJR—MacDonald* at pages 337-38, the Supreme Court discussed the characteristics of "a serious question to be tried." It noted that there were no specific requirements to be met in order to satisfy the test; the threshold is a low one. The judge hearing the motion for the injunction (or stay) is required to make a preliminary assessment of the merits of the case. If the judge concludes that the issues raised are not frivolous or vexatious, the test is satisfied even if the judge's own view is that the applicant is unlikely to succeed when the case is heard on the merits. The Supreme Court brought this portion of its analysis to a close by remarking that "[a] prolonged examination of the merits is generally neither necessary nor desirable": *RJR—MacDonald* at 338.

[21] This is to be contrasted with *Groupe Archambault*, where the following comment appears at paragraph 7: "Before addressing the conditions for issuing an interlocutory stay of

proceedings, the Court must be satisfied that its intervention is warranted under the circumstances." This led the motions judge in that case to dismiss the motion for a stay before even addressing the *RJR—MacDonald* factors. While the result in *Groupe Archambault* can perhaps be justified on its facts – the underlying judicial review, a challenge to a decision as to the disclosure of documents in the course of a discovery process, was doomed to fail – its reasoning cannot be reconciled with *RJR—MacDonald*.

[22] The insertion of a decision on the merits of the underlying application before consideration of the tri-partite test for granting a stay or an injunction pre-empts the question of whether there is a serious issue, as the Supreme Court has conceived it. It forces applicants who need only meet a low threshold under the serious issue branch of the tri-partite test to satisfy the more demanding test of showing extraordinary circumstances as a condition of being heard on their application for a stay. Prematurity/extraordinary circumstances is a feature of the law of judicial review, and not of the law of injunction. The creation of a requirement that prematurity be negatived before the tri-partite test can be considered is a conflation of the law governing two distinct remedies, for which no justification has been offered other than a repetition of the rationale underlying the doctrine of prematurity.

[23] I can only conclude that *Groupe Archambault* was wrongly decided and ought not to be followed. As it was a decision of a single judge of this Court, *Groupe Archambault* is not binding on a panel of the Court so there is no need to engage in the analysis set out in *Miller v. Canada (Attorney General)*, 2002 FCA 370 at paragraphs 8-10, 220 D.L.R. (4th) 149.

[24] To summarize, prematurity and extraordinary circumstances (two aspects of the same policy of judicial restraint) are not free-standing preliminary questions which must be addressed before considering the tri-partite test. These issues should be considered under the heading of serious issue where, consistently with *RJR—MacDonald*, the question is whether their weight is such that the underlying application can be considered frivolous or vexatious. If not, the Court proceeds to the next step of the analysis.

[25] In this case, the Federal Court's determination that it could dismiss the appellant's motion for a stay on the basis of prematurity was based on an error of law, though the responsibility for the error lies elsewhere. This error would justify our intervention but for the fact that consideration of the tri-partite test persuades me that the appeal must be dismissed.

VII. THE TRI-PARTITE TEST

[26] The Federal Court found that there was a serious question as to the jurisdiction of the CJC to reconsider complaints which it had previously dismissed. The Federal Court's conclusion on this point was not challenged in the argument before us. As a result, I will proceed on the basis that this portion of the tri-partite test has been satisfied.

[27] Two issues have been raised in relation to irreparable harm, (i) whether the Federal Court chose the right evidentiary standard and (ii) whether the Federal Court made a palpable and overriding error in concluding that the appellant would not suffer irreparable damage if the stay was not granted.

[28] As regards the first issue, the Federal Court applied the clear and compelling evidence standard set out in cases such as *Choson Kallah Fund of Toronto v. Canada (Minister of National Revenue)*, 2008 FCA 311 at paragraphs 5-11, 383 N.R. 196 and *Gateway City Church v. Canada (Minister of National Revenue*), 2013 FCA 126 at paragraph 14, 445 N.R. 360 [*Gateway City Church*] and the cases cited therein. The appellant argues that in cases involving reputational damage or damage to other social attributes such as credibility, the occurrence of irreparable harm can be inferred, relying on cases such as *Adriaanse v. Malmo-Levine*, 161 F.T.R. 25 at paragraphs 20-22, 1998 CanLII 8809 (F.C.) [*Malmo-Levine*], *Douglas v. Canada (Attorney General)*, 2014 FC 1115 at paragraph 43, 94 Admin. L.R. (5th) 229 [*Douglas*], and *Bennett v. British Columbia (Superintendent of Brokers)*, 77 B.C.L.R. (2d) 145, 1993 CanLII 2057 (B.C.C.A.) at paragraphs 17-18 [*Bennett*].

[29] In my view, the presence of two lines of cases such as these shows that the quality of the evidence – "clear and compelling" or something less – is a function of the nature of the irreparable harm being alleged. Where the harm apprehended is financial, clear and compelling evidence is required because the nature of the harm allows it to be proven by concrete evidence such as that set out at paragraph 17 of *Gateway City Church*. In the case of harm to social interests such as reputation or dignity, as in *Douglas*, the occurrence of irreparable harm can be satisfied by inference from the whole of the surrounding circumstances.

[30] In my view, the Federal Court erred in law in excluding the possibility of proof of damage to reputation by inference.

[31] That said, the question is whether the appellant is able to show such damage to his reputation. The appellant says that the proceedings before the Inquiry Committee will irreparably harm the reputation he acquired in the course of his years on the bench. I am sensitive to this argument, but the difficulty I have is that the harm of which the appellant complains is inherent in the process in which he is engaged. If the appellant is likely to suffer irreparable harm solely from the fact that his conduct will be the subject of Inquiry Committee proceedings, then all judges who find themselves in the same position also suffer irreparable harm. I am not prepared to make such a finding.

[32] This difficulty is compounded by the fact that, in this case, the appellant has already been exposed to a certain amount of public exposure resulting from the contemporary coverage of his involvement in the events giving rise to these proceedings as well as in the coverage of the proceedings themselves to date.

[33] This is not to say that judicial conduct proceedings can never give rise to irreparable harm to a judge's reputation. But in order to do so, it appears to me that there must be some factor, some element in the surrounding circumstances that takes the case out of the normal run of such proceedings. The judge would have the burden of showing the presence of such a factor. Once the presence of such a factor was shown, the issue is whether it permits the inference of the likelihood of irreparable harm.

[34] In the cases the appellant put to us as examples of proceedings stayed on the basis of irreparable harm, there were such factors. In *Douglas*, the issue was a privacy interest in relation

to certain photos, whereas in *Bennett* and *Malmo-Levine*, the issue was the risk of an adverse result by a tribunal which was alleged to be biased. These factors raise issues of reputational damage but, in my view, but it was the addition of another element which gave rise to the inference of irreparable harm.

[35] Does an allegation of lack of jurisdiction permit an inference of irreparable harm? It could but I do not believe that it gives rise to that inference in every case. The threat of damage to reputation inherent in Inquiry Committee proceedings does not flow from the Committee's jurisdiction but from the evidence it hears. To the extent that the possibility of vindication at the end of the proceedings exists, any harm suffered in the course of proceedings could be remedied in whole or in part.

[36] It is no doubt infuriating to be dragged into a process which one believes has no basis in law but that does not amount to irreparable damage to reputation. It may, in particular circumstances, give rise to some other kind of irreparable harm but, on this record, there is no reason to believe that we are in the presence of such circumstances.

[37] In the circumstances, I have not been persuaded that the Federal Court fell into palpable and overriding error in concluding that the appellant has not shown that he will suffer irreparable harm if his motion for a stay is not granted.

VIII. CONCLUSION

[38] In light of the above, I would dismiss the appeal. As costs have not been sought, none will be awarded.

"J.D. Denis Pelletier"

J.A.

“I agree
Johanne Trudel”

“I agree
Donald J. Rennie

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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