Federal Court of Appeal | Cour d'appel fédérale

Date: 20170525

Dockets: A-209-16
A-210-16
A-211-16

Citation: 2017 FCA 112

CORAM: **TRUDEL J.A.**
SCOTT J.A.
GLEASON J.A.

BETWEEN:

SERGE EWONDE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on May 10, 2017.

Judgment delivered at Ottawa, Ontario, on May 25, 2017.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: SCOTT J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

I. Procedural Background

[1] These are consolidated appeals from Orders of the Federal Court dismissing the appellant's actions for delay (T-1015-12; T-1016-12; T-1017-12, April 4, 2016, Bell J.).

[2] The appellant (or Mr. Ewonde) is an inmate serving a long sentence in a federal prison. He has commenced three actions in the Federal Court, all drafted in English. However, Mr. Ewonde is from Montreal, and French is his mother tongue.

[3] After surviving a Status Review, the appellant's actions became specially managed proceedings under the case management of a prothonotary.

[4] Several orders and directions were then issued by the Prothonotary in order to move the proceedings forward. During that time, the appellant—except for short periods of time—was representing himself. He did not follow through with his proceedings as instructed.

[5] As a result, on January 25, 2016, the respondent filed motions to dismiss the appellant's actions for delay.

[6] Mr. Ewonde replied to these motions in French, claiming that he was no longer capable of adequately representing himself in English, his second language. His English skills had been supported in the past by both former counsel and his fellow inmates in his former institution in British Columbia, supports that were no longer available to him at his new institution in Ontario (see Appeal Book, Tab 6 at page 69—inmate's request dated February 6, 2016).

[7] Citing her objection under section 18 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) (OLA) to use English in the written proceedings once the actions had been commenced in that language, the respondent replied to Mr. Ewonde's request as follows:

> If the [appellant] wished for these proceedings to be conducted in French, he should have initiated these actions in that language or, at the very least, requested that they be changed for French at an earlier date. It is too late for the [appellant] to raise this issue and he should not be allowed to further delay these proceedings.
>
> (Appeal Book, Tab 7 at page 70)

[8] Following that exchange of correspondence, the Prothonotary issued Directions stating his agreement with the respondent's view. He also added that he was "not satisfied that the [appellant] is handicapped by language in responding to the [respondent's] motion" and that "[i]t is always open to him to seek assistance from other inmates." As a result, the Prothonotary directed the appellant to serve his reply to the motions within fourteen days (Appeal Book, Tab 8 at page 71).

[9] The appellant filed no reply, and the respondent's motions to strike the actions were referred to a judge of the Federal Court for disposition. Hence, the three Orders appealed from. No reasons were issued.

II. The Positions of the Parties

[10] The appellant submits that the Federal Court erred in striking his actions for delay without considering:

- his lack of timely access to relevant documents due to the penitentiary settings or the negligent or deliberate obstructions of correctional staff;
- his lack of understanding of the English language at any point in the litigation process; and, most importantly,

- his protected rights under 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, and the OLA.

[11] For her part, the respondent argues that the appellant is the author of his own misfortune, as he failed to serve and file his motion records in accordance with the Prothonotary's Directions. Moreover, "[t]he … direction did not specify a language for the appellant's responding motion record" (respondent's Memorandum of Fact and Law at paragraph 12).

[12] In her Memorandum of Fact and Law, the respondent also notes that the appellant did not appeal from the Directions to a judge of the Federal Court (*ibidem* at paragraph 13). Finally, the respondent questions whether or not the official language issue was before the Judge.

III. Analysis

[13] The standard of review of a decision by the Federal Court is the standard set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Errors of law or legal principle will be corrected by this Court, while only palpable and overriding errors of fact or mixed fact and law will warrant our intervention.

[14] It would be an understatement to say that the appellant's progress in the five years since the commencement of these proceedings has been unsatisfactory. On that ground alone, I could accept that the Judge had evidence supporting his Orders. But this is not the end of the matter, as the Judge and, before him, the Prothonotary, failed to respond to the substance of the appellant's request to continue his actions in French. Neither the Judge nor the Prothonotary addressed Mr.

Ewonde's constitutional right to choose French in the context of his Court proceedings. In my respectful view, this omission amounts to an error of law.

[15] I disagree with the respondent that "[t]he appellant's arguments on this appeal regarding his language abilities … were not before the … [J]udge" (respondent's Memorandum of Fact and Law at paragraph 17). The letters from the appellant and respondent, as well as the Prothonotary's Directions, were all tagged with docket numbers and would have been in the Court's files. The impugned Orders state that the Judge "read the material filed" by the parties, though the appellant submitted no reply to the motions. The Judge also issued his Orders simultaneously in English and French—something that had not occurred before in the appellant's files in the Federal Court. I infer that the Judge knew of the appellant's request to continue in French. At the hearing of this appeal, counsel for the respondent conceded that it would be reasonable, on this record, to draw this inference.

[16] It is thus surprising that the Judge issued his bilingual Orders dismissing the appellant's actions for delay and, by doing so, overlooked the clear legal error made by the Prothonotary when he opined that he was "not satisfied that the [appellant] is handicapped by language in responding to the [respondent's] motion."

[17] Bilingual people do not have weaker constitutional language rights than unilingual people. As this Court recently noted in *Industrielle Alliance, Assurance et service financiers inc. v. Mazraani*, 2017 FCA 80 at paragraph 10:

> Significantly, a person's ability to express him or herself in both official languages does not impact such person's constitutional right to choose either

> French or English in the context of court proceedings. One's ability to speak both official languages is "irrelevant". In the words of the Supreme Court of Canada in *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, 173 D.L.R. (4th) 193 at paragraph 45 [*Beaulac*]:
>
> > In the present instance, much discussion was centered on the ability of the accused to express himself in English. This ability is irrelevant because the choice of language is not meant to support the legal right to a fair trial, but to assist the accused in gaining equal access to a public service that is responsive to his linguistic and cultural identity.

[18] Thus, an individual may elect to institute proceedings against the Crown in either official language, regardless of their mother tongue. An individual may also re-elect, during the course of proceedings, and the Crown will be obliged to switch languages as well, unless the Crown establishes that reasonable notice has not been given. Section 18 of the OLA reads as follows:

18 Where Her Majesty in right of Canada or a federal institution is a party to civil proceedings before a federal court,	**18** Dans une affaire civile à laquelle elle est partie devant un tribunal fédéral, Sa Majesté du chef du Canada ou une institution fédérale utilise, pour les plaidoiries ou les actes de la procédure, la langue officielle choisie par les autres parties à moins qu'elle n'établisse le caractère abusif du délai de l'avis l'informant de ce choix. Faute de choix ou d'accord entre les autres parties, elle utilise la langue officielle la plus justifiée dans les circonstances.
(a) Her Majesty or the institution concerned shall use, in any oral or written pleadings in the proceedings, the official language chosen by the other parties unless it is established by Her Majesty or the institution that reasonable notice of the language chosen has not been given; and …	

[19] Since I propose that these appeals be allowed, the issue of reasonable notice is moot on a going-forward basis, and I will not address it any further.

[20] As I am of the view that the official language issue was in front of the Judge, I now turn my mind to the Prothonotary's Directions.

[21] The Directions, as drafted, lead me to the conclusion that the Prothonotary accepted Mr. Ewonde's letter of request to continue the proceedings in French as a proper motion. He could have instructed Mr. Ewonde to serve and file proper motions for orders disposing of the language issue that he was raising, but he did not.

[22] This observation leads to one particular comment: directions are not the proper form to dispose of motions (*Fabrikant v. Canada*, 2015 FCA 53, [2015] F.C.J. no. 243 (QL), at paragraph 9). Orders should have been issued. It appears from the wording of the Directions that the Prothonotary was in effect disposing of the language issue, opting to simply direct the appellant to file his motion records in reply to the respondent's motions to dismiss.

[23] This said, it was open to the Prothonotary to find that the respondent had not been reasonably notified that she would have to plead her motion in French—the language of the respondent's motion could not be retroactively changed by a subsequent request made by the appellant.

[24] However, it was an error to suggest that the appellant ought to continue pleading in English because he was capable of doing so alone or assisted by other inmates. The appellant's right to plead in either official language is enshrined in section 14 of the OLA, which states that "either [official language] may be used by any person in, or in any pleading in or process issuing from, any federal court." Failing to recognize a party's right to plead in the language that they have chosen amounts to an error of law.

[25] As stated above, the respondent argues that Mr. Ewonde was not prevented from filing his motion record in French (respondent's Memorandum of Fact and Law at paragraphs 25, 28). A reasonable reading of the Prothonotary's Directions does not support that assertion. On the contrary, I find that they rather discourage the appellant from filing documents in French. Once again, not only was he told that use of the English language does not constitute an impairment for him, but he was also invited to continue relying on the help of other inmates—obviously to draft his proceedings in English, as it appears quite clearly from the appellant's request (inmate's request) that he writes fluently in French.

[26] It was an even more serious error on the part of the Prothonotary to suggest that the appellant ought to give evidence in a language other than the one he chose. Section 15(1) of the OLA imposes on the Court a positive duty "to ensure that any person giving evidence before it may be heard in the official language of his choice." Had the appellant filed a reply and motion record to the respondent's motion to dismiss, he would likely have filed an affidavit explaining his delay. The jurisprudence is clear that he was entitled to file this affidavit in either official

language, regardless of the language of the pleadings (see *Charlebois v. Saint John (City)*, 2005 SCC 74, [2005] 3 S.C.R. 563).

[27] The OLA requires more of the Courts than mere permission to appear in either official language. The OLA imposes positive duties on Courts to encourage and facilitate access to its services in either official language.

[28] In my respectful view, here the Federal Court did not uphold its obligations under the OLA to the appellant as party or as potential affiant. This error of law requires our intervention.

IV. Proposed Disposition

[29] For these reasons, I propose to allow the appeals with one set of costs and to strike the Federal Court's Orders dismissing the appellant's actions in dockets T-1015-12, T-1016-12, and T-1017-12.

[30] Rendering the Orders that the Federal Court ought to have given, and keeping in mind the time already elapsed in these files, the appellant is given a delay of three weeks from the issuance of the judgment to issue from this Court:

- To serve and file in the Federal Court his motion records (in the official language of his choice) in reply to those of the respondent for orders dismissing his actions.

[31] As a result, these files will continue in the Federal Court in the language chosen by the appellant, the next step being the reconsideration of the respondent's motions to dismiss the appellant's actions.

[32] A copy of these reasons will be placed in files A-210-16 and A-211-16.

"Johanne Trudel"

J.A.

"I agree.
A.F. Scott J.A."

"I agree.
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-209-16 A-210-16 A-211-16
STYLE OF CAUSE:	SERGE EWONDE v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	OTTAWA, ONTARIO
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REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	SCOTT J.A. GLEASON J.A.
DATED:	MAY 25, 2017

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