Federal Court of Appeal  Cour d'appel fédérale

Date: 20170606

Docket: A-427-16

Citation: 2017 FCA 120

CORAM: **DAWSON J.A.**
DE MONTIGNY J.A.
WOODS J.A.

BETWEEN:

ANIZ ALANI

Appellant

and

THE PRIME MINISTER OF CANADA, THE GOVERNOR GENERAL OF CANADA AND THE QUEEN'S PRIVY COUNCIL FOR CANADA

Respondents

Heard at Toronto, Ontario, on May 30, 2017.

Judgment delivered at Ottawa, Ontario, on June 6, 2017.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The appellant commenced proceedings in the Federal Court seeking a declaration that "the Prime Minister of Canada must advise the Governor General to summon a qualified Person to the Senate within a reasonable time after a Vacancy happens in the Senate." The appellant

argued that the Prime Minister is constitutionally required to recommend appointments to fill vacancies in the Senate.

[2] The Federal Court dismissed the appellant's application on the basis that it had become moot, and ordered the appellant to pay the respondents' costs (2016 FC 1139). These costs were subsequently assessed on consent in the amount of $20,489.52.

[3] On this appeal from the judgment of the Federal Court the appellant does not challenge that aspect of the judgment that dismissed the application on the grounds of mootness. Rather, the appellant asks that the order of the Federal Court be set aside and substituted with an order that the appellant pay costs and disbursements incurred by the respondents only for steps taken after December 3, 2015. December 3, 2015 is the date on which the government announced the establishment of the Independent Advisory Board for Senate Appointments. This date is said to be the earliest date on which the application became moot. Costs assessed on this basis total $4,680.14.

[4] In order to situate the issues raised on this appeal it is necessary to understand both the costs submissions made before the Federal Court and the resulting reasons of the Federal Court.

[5] The appellant made two principal submissions in the Federal Court. First, after reviewing jurisprudence to the effect that costs may be awarded to an unsuccessful party who raises an issue of public interest, the appellant sought in any event of the cause costs fixed in an amount between $13,000 and $25,000, depending upon the Court's assessment of the complexity of the

case. Second, in the alternative, the appellant asked that if not successful, costs not be awarded against him. This submission was made on the basis that the appellant had brought the application in the public interest.

[6] In response, the respondents submitted that costs should follow the event and that the costs should be determined on an assessment. The respondents challenged the appellant's submission that he had brought his application in the public interest. This submission was based on the arguments that the appellant lacked public interest standing and that the appellant did not lead evidence of "any significant demand by the public at large for a court ruling on Senate vacancies".

[7] Faced with these conflicting positions, the Federal Court's reasons on the issue of costs were:

> The respondents, while recognizing that Mr Alani brought his application in good faith as a concerned and interested citizen, point out that he has pursued his case in the face of clear indications of mootness and has put the government to substantial legal costs. They ask the Court to grant them costs calculated according to the usual tariff. I agree and will make the corresponding order.

[8] On this appeal the appellant acknowledges that the Federal Court has full discretion over the amount of costs to be awarded. The appellant does not challenge the "decision that he be liable to pay some costs to the Respondents" (appellant's memorandum of fact and law at paragraph 35). This said, the appellant submits that the Federal Court erred by failing to consider two relevant factors and this failure resulted in an award of costs that was inconsistent with the reasons of the Federal Court. The relevant factors said to be ignored are:

i. By the earliest date on which the application became moot, December 3, 2015, the only remaining step in the application was the hearing of the application. Thus, it cannot be said that the appellant "pursued his case in the face of clear indications of mootness and has put the government to substantial legal costs" as the Federal Court found at paragraph 25 of its reasons.

ii. The public interest nature of the case.

A third factor referred to in the appellant's memorandum of fact and law was withdrawn during oral argument.

[9] The respondents argue on this appeal that:

i. The appellant never sought in the Federal Court an order whereby he would enjoy an immunity from an award of costs incurred before the application became moot. It follows that the appellant ought to be precluded from seeking such an order for the first time in this Court.

ii. Further, had this argument been advanced below, Canada would likely have advanced a number of arguments including that: the application was unfounded; the appellant lacked public interest standing; the proceeding was not in the public interest; and, the appellant refused a reasonable settlement offer made after the application became moot.

iii. The Federal Court was entitled to exercise its discretion as it did.

[10] In oral argument counsel for the appellant objected to the respondents' reference to the settlement offer. Counsel argued that except in certain limited circumstances not applicable in this case, Rule 422 of the *Federal Courts Rules* prohibits any "communication respecting an offer to settle … until all questions of liability and the relief to be granted, other than costs, have been determined."

[11] Before turning to the submissions of the parties, it is important to remember that an award of costs is "quintessentially discretionary" (*Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at paragraph 126). Rule 400(1) of the *Federal Courts Rules* gives the Court "full discretionary power over the amount and allocation of costs".

[12] An award of costs is to be reviewed on the standard articulated by the Supreme Court in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, 402 D.L.R. (4th) 497, at paragraph 64 and following; *Nova Chemicals Corporation v. Dow Chemical Company*, 2017 FCA 25, [2017] F.C.J. No. 173, at paragraph 6). It follows that to succeed on this appeal, the appellant must demonstrate an error of law or a palpable and overriding error of fact or mixed fact and law.

[13] I begin my analysis by rejecting the submission of the respondents that because the appellant did not seek an order limiting an award of costs against him to those costs incurred after the application became moot, he cannot advance this position in this Court. In the Federal Court the appellant sought costs even if he was unsuccessful. In the alternative, he asked that if he was unsuccessful costs not be awarded against him. The appellant did not know the basis on

which the Federal Court would award costs. It must be open to the appellant to argue that an award of the entire costs against him was made in error and that the Court's reasons do not support the resulting award.

[14] Put another way, the appellant's argument is not so legally and factually distinct from the issues argued in the Federal Court so as to be an impermissible new issue.

[15] Nor am I persuaded that the respondents are prejudiced by consideration of this issue. The record demonstrates that the respondents did argue in their costs submission that the appellant lacked standing and that the proceeding was not in the public interest. The submission as to costs followed immediately after the respondents' submission that the application lacked merit. Had the respondents complied with Rule 422 they could have made reference to the settlement offer. Indeed, it is difficult to see why the respondents did not ask the Federal Court to reserve the issue of costs so that reference could be made to the settlement offer after the application was dismissed and when costs remained the sole issue.

[16] More will be said below about the settlement offer. It is in the record, the application brought by the appellant has been finally determined and I see no basis to preclude this Court from having regard to the offer.

[17] This leaves for consideration the appellant's arguments that the Federal Court erred by finding that he pursued his case in the face of clear indications of mootness and by failing to have regard to the public interest nature of the case.

[18] I agree that at first blush it may seem somewhat anomalous to find that a party pursued his case in the face of clear indications of mootness in circumstances where the party took only a single step after the application became moot. However, any seeming anomaly is explained when one has regard to the settlement offer.

[19] On January 21, 2016, after the application had become moot, counsel for the respondents made a "with prejudice" offer to settle. The offer was one whereby the parties would immediately discontinue their respective proceedings before the Federal Court and this Court on a without costs basis. The appellant did not accept the offer, thus requiring the respondents to proceed with their appeal from an order dismissing their motion to strike the application and the hearing of the application.

[20] In my view, on the basis of the appellant's rejection of the settlement offer the Federal Court committed no palpable and overriding error in finding that the appellant continued to pursue his case in the face of clear indications that it was moot. The effect of the offer was to allow the appellant to walk away from the litigation once the application became moot with no exposure to costs. The appellant chose not to.

[21] As to the second asserted error, while I agree that the reasons of the Federal Court were sparse, the Court did reference the fact that the appellant had "brought his application in good faith as a concerned and interested citizen". In light of this apparent allusion to a public, not private, interest and in the circumstance where both the respondents and the appellant addressed

the issue of public interest in their costs submissions, I am not prepared to infer that the Federal Court overlooked the appellant's submission that he was a public interest litigant.

[22] Without doubt, there are cases of great public moment where the issues are novel and advancing those issues is in the public interest so that no award of costs ought to be made against the public interest litigator. However, such litigants are not automatically immune from an award of costs (*Canadian Environmental Law Assn. v. Canada (Minister of the Environment)* (2000), 258 N.R. 95, 34 C.E.L.R. (N.S.) 159 (FCA)). It follows that it was open to the Federal Court to make the costs order it did notwithstanding the asserted public interest in the litigation. No error of fact or law has been demonstrated.

[23] It follows that I would dismiss the appeal. In my view, this is an appropriate case for the parties to bear their own costs, so I would not order costs in this Court.

"Eleanor R. Dawson"

J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
J. Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Mark Freiman Lucas E. Lung	FOR THE APPELLANT
Jan Brongers Oliver Pulleyblank	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Lerners LLP Toronto, Ontario	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENTS