Federal Court of Appeal  Cour d'appel fédérale

Date: 20181213

Docket: A-83-18

Citation: 2018 FCA 228

CORAM: **GAUTHIER J.A.**
STRATAS J.A.
NEAR J.A.

BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION

Appellant

and

SADDLE LAKE CREE NATION, CHIEF AND COUNCIL, on their own behalf and on the behalf of all the members of the Saddle Lake Cree Nation, AND THE ATTORNEY GENERAL OF CANADA

Respondents

Heard at Calgary, Alberta, on December 11, 2018.

Judgment delivered at Calgary, Alberta, on December 13, 2018.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: GAUTHIER J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The Canadian Human Rights Commission appeals from the judgment dated February 5, 2018 of the Federal Court (*per* Phelan J.): 2018 FC 127. For the reasons that follow, I would allow the appeal in part, set aside the judgment of the Federal Court, lift the stay of the application for judicial review, strike out certain grounds in it, and dismiss the action.

A. Background

[2] The Saddle Lake Election Panel for the Saddle Lake Cree Nation decided that Ms. Wirth's name should not appear on the ballot for a band council election in 2010.

[3] In response, Ms. Wirth filed a complaint with the Canadian Human Rights Commission. She alleged that the Election Panel did not include her name on the ballot because her spouse was Caucasian.

[4] The Election Panel denied any human rights violation; it said that its decision had nothing to do with the race of Ms. Wirth's spouse.

[5] Ms. Wirth ran in the next two elections for the band council in 2013 and 2016. She was not elected. She has now left the reserve and has moved to Vancouver. She has maintained her human rights complaint about the 2010 election.

[6] The Commission decided that an inquiry into the complaint by the Canadian Human Rights Tribunal was warranted under paragraph 44(3)(*a*) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

[7] Saddle Lake applied to the Federal Court to set aside the Commission's decision. Ms. Wirth, as the complainant before the Commission, was properly a respondent to Saddle Lake's application. Later, the Federal Court added the Commission as an intervener.

[8] From this point, things went askew. At the suggestion of the Federal Court, Saddle Lake brought a motion in the Federal Court to have the application for judicial review "treated and proceeded with as an action" under subsection 18.4(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. The Federal Court granted the motion. But it went beyond just treating the application for judicial review as an action. It stayed the application for judicial review and ordered that a statement of claim be filed challenging the decision of the Commission. Saddle Lake did so; a fresh action was begun.

[9] Things went even more askew. The parties in the action were different from those in the application for judicial review. The Attorney General of Canada was a respondent in the application for judicial review, later was removed at her request, and then was added; then she was named as a party defendant in the fresh action. The Commission, named in the application, initially was not named in the action. Later, the Commission moved to be an intervener in the action. The Federal Court denied the motion. But a little while later, at the suggestion of the Federal Court, the Commission moved again to intervene because no other party was present to oppose a summary judgment motion brought by Saddle Lake. This time, the Federal Court made the Commission an intervener in the action with rights to appeal.

[10] When determining Saddle Lake's motion for summary judgment, the Federal Court stated that the Commission "ultimately played the role of defendant." But the Federal Court never made an order formally making the Commission a party defendant in the action. This has created the unusual circumstance here—an intervener is the only appellant in this Court.

[11] Most importantly, Ms. Wirth, whose human rights complaint the Commission decided to place before the Tribunal and who was quite properly a respondent to the application attacking that decision, was not named in the fresh action. As a result, Ms. Wirth—perhaps the party most affected of all—was left without any rights to participate or have any say.

[12] Within these unusual, miscast proceedings, the motions ultimately giving rise to this appeal took place. Saddle Lake brought a motion for summary judgment. In its motion, Saddle Lake invited the Federal Court to quash the Commission's decision and stop the Tribunal from proceeding because the holding of the band council election is not a "service" under section 5 of the *Canadian Human Rights Act*. In response, the Commission moved for an order allowing the Tribunal to proceed with all issues concerning Ms. Wirth's complaint, or alternatively for a ruling on the section 5 issue in its favour. The motion was not brought by a separate notice of motion; rather, the Federal Court seems to have accepted a reference to a possible stay motion in the notice of motion filed in support of the Commission's second attempt to intervene as a freestanding motion. This informality has caused us no small degree of confusion.

[13] In the end, the Federal Court agreed with Saddle Lake. It accepted Saddle Lake's submissions about the meaning of "service" under section 5 of the *Canadian Human Rights Act* and granted Saddle Lake's summary judgment motion. The Federal Court enjoined "the Commission" [sic] from "proceeding further with its inquiry." It dismissed the Commission's motion.

[14] The Commission now appeals. It submits that the Tribunal should either be allowed to continue its proceedings or the section 5 issue should be determined in its favour.

[15] From these simple facts, a dense forest of issues arises. The parties did not raise all of these issues in their memoranda of fact and law. During argument, we raised them with the parties and received their submissions on them.

B. The status of Ms. Wirth

[16] The Tribunal is dealing with Ms. Wirth's complaint. She has an interest in any proceedings that may affect her complaint. Yet, improperly, Ms. Wirth was not made a party to the action or the motions for summary judgment in the Federal Court. Nor has she been made a party in this Court.

[17] After being served with the application for judicial review, Ms. Wirth did not file a notice of appearance under Rule 305 of the *Federal Courts Rules*, SOR/98-106. This may have been the reason why Ms. Wirth was not named to the action, the motions or this appeal.

[18] If so, the consequence of failing to file a notice of appearance has been misunderstood. It is set out under Rule 145. A party who fails to file a notice of appearance is not entitled to service of any further documents in the proceeding before final judgment is rendered. Only entitlement to service is affected. Ms. Wirth's failure to file a notice of appearance does not mean that she is no longer interested in the application or any related proceeding attacking the

Commission's decision or that she can be treated as having no interest. In fact, under Rule 395, she is ultimately entitled to get a copy of the Court's reasons and judgment so, if necessary, she can appeal.

[19] Thus, assuming for the moment that Saddle Lake was correct in starting a fresh action, Ms. Wirth was a necessary party. It was a clear violation of procedural fairness not to have made her a party.

[20] It also follows that Ms. Wirth should have been made a party respondent to this appeal. However, as will be seen, the action challenging the referral of her complaint to the Tribunal is being struck in its entirety; this result is entirely favourable to Ms. Wirth. As for the application challenging the referral of her complaint to the Tribunal, as will be seen, most of it is being struck. But she has failed to file a notice of appearance in the application and, thus, has waived any rights to participation in the application. Thus, in the end, Ms. Wirth's absence in this appeal is of no consequence: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, 111 D.L.R. (4th) 1 (applicable to administrative proceedings, but analogous to the present circumstance).

C. The status of the Commission

[21] Before us, the Commission is the appellant. In the Federal Court, it was only an intervener. Normally only parties, as opposed to interveners, can appeal. An intervener can have

a sufficient interest in some circumstances to have direct standing to appeal: *League for Human Rights of B'Nai Brith Canada v. Odynsky,* 2010 FCA 307, [2012] 2 F.C.R. 312.

[22] No one suggests that the Commission does not have a sufficient interest to appeal. Indeed, the Federal Court found that in the motion brought by Saddle Lake the Commission was equivalent to a respondent. Even if the Commission were only an intervener, it brought a motion to the Federal Court and the Federal Court dismissed its motion. Further, the Federal Court gave the Commission the right to appeal when granting it intervener status. Overall, the Commission has standing to appeal the dismissal of its motion and is a proper appellant in this appeal.

D. The order under subsection 18.4(2) of the *Federal Courts Act*

[23] Under subsection 18.4(2) of the *Federal Courts Act*, the application for judicial review is "to be treated and proceeded with as an action." It is not stayed. It is not replaced by a fresh action. The notice of application is not to be replaced with a statement of claim. After all, judicial review remedies can only be granted on an application for judicial review: *Federal Courts Act*, s. 18(3).

[24] The effect of subsection 18.4(2) is purely procedural, not substantive. The originating document remains the notice of application. The substantive law remains the law of judicial review. All that happens after a subsection 18.4(2) order is that the Rules relating to actions become available when the application is prosecuted.

[25] An order under subsection 18.4(2) should specify in what ways the application is to be treated as and proceeded with as an action. The order might provide for the conducting of discoveries. It might schedule motions for summary judgment and the hearing itself. It might allow amendments to the grounds for review in the notice of application to be made. Since the procedures for actions apply, sometimes amendments supporting a public law damages claim are allowed: *Paradis Honey v. Canada*, 2015 FCA 89, [2016] 1 F.C.R. 446.

[26] In this case, the Federal Court never should have stayed the application for judicial review. It never should have authorized a fresh action. Saddle Lake never should have brought a fresh action.

E. The Commission's decision

[27] The Commission decided under paragraph 44(3)(*a*) of the *Canadian Human Rights Act* that the Tribunal should conduct an inquiry into the complaint. Using the words of this paragraph, the Commission had to be satisfied that:

- "having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted" (subpara. 44(3)(*a*)(i)); and

- "the complaint…should not be referred [to grievance or review procedures otherwise reasonably available or be dealt with by means provided for under another Act of Parliament] or dismissed because [it is beyond the Commission's

jurisdiction, the complaint is trivial, frivolous, vexatious or made in bad faith or is late]" (subpara. 44(3)(*a*)(ii)).

F. The application for judicial review

[28] Saddle Lake's application for judicial review and its action assert two categories of grounds for quashing the Commission's decision:

(1) *Legal issues that are for the Tribunal to decide on the merits*. Saddle Lake asserts two such issues: the Tribunal and the Commission do not have jurisdiction because: (a) section 35 of the *Constitution Act, 1982* (see paras. 7 and 36-40 of the amended notice of application); and (b) the Election Panel's vetting of election nominees is not a "service" within the meaning of section 5 of the *Canadian Human Rights Act* (see paras. 4-6 and 22-29 of the amended notice of application).

(2) *Matters relating to the Commission's screening function under section 44*. Saddle Lake asserts one such issue: it says that the complainant, Ms. Wirth, could have judicially reviewed the Election Panel's decision not to allow her to run for election rather than making a complaint to the Commission (see paras. 30-35 of the amended notice of application); the Commission should have applied subsection 44(2) of the Act.

G. The limits of judicial review in these circumstances: the Supreme Court's decisions in *Halifax* and *Okwuobi*

[29] We are dealing with a decision of the Canadian Human Rights Commission to refer a matter to the Canadian Human Rights Tribunal. The scope of judicial review of this decision is very limited: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364.

[30] In *Halifax*, the Supreme Court held that judicial review of such a decision is limited to whether there was a reasonable basis for the referral to the Tribunal to be made under the applicable statutory provision, in this case subsection 44(3) of the *Canadian Human Rights Act*. The Supreme Court stressed that judicial review is not a mechanism by which legal issues for the Tribunal to decide at first instance can be removed and placed before courts.

[31] The key portions of *Halifax* are as follows (at paras. 19, 21, 45 and 51):

> …The Commission's decision to refer a complaint to a board of inquiry is not a determination of whether the complaint falls within the Act. Rather, within the scheme of the Act, the Commission plays an initial screening and administrative role; it may, for example, decide to refer a complaint to a board of inquiry so that the board can resolve a jurisdictional matter.
>
> There is no legislative requirement that the Commission determine that … it passes some merit threshold before appointing a board of inquiry; the Commission must simply be "satisfied" having regard to all the circumstances of the complaint that an inquiry is warranted.
>
> …

> In my view, the reviewing court should ask whether there was any reasonable basis on the law or the evidence for the Commission's decision to refer the complaint to a board of inquiry.
>
> …
>
> …[This] makes it clear that reviewing courts should be reluctant to intervene before a board of inquiry has addressed the substance of the points with respect to which the application for judicial review is brought. A reviewing court should take into account the benefit of having the board's considered view of the point raised on review as well as the risks of an unnecessary multiplication of issues and delay as was caused by premature judicial intervention in this case. Only where there is no reasonable basis in law or on the evidence to support the Commission's decision that an inquiry by a board of inquiry is warranted in all the circumstances would it be appropriate to overcome judicial reluctance to intervene.

[32] As a result, in this case it was not open to Saddle Lake to start a judicial review of legal issues that the Tribunal is to decide on the merits, namely—the issue arising under section 35 of the *Constitution Act, 1982* and the issue whether the Election Panel's vetting of nominees is a "service" within the meaning of section 5 of the *Canadian Human Rights Act*. Consistent with the Supreme Court's words in *Halifax*, these are legal issues for the Tribunal to determine first, not for a reviewing court at this time.

[33] On these issues, Saddle Lake's application and summary judgment motion smack of prohibition: it is trying to stop the Tribunal from dealing with Ms. Wirth's complaint because it says that the Tribunal has no legal authority to consider it. This is exactly what the judicial review applicants in *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756 tried to do. They started a judicial review to stop the Ontario Human Rights Commission from dealing with a human rights complaint because the Commission was not dealing with a "self-contained dwelling unit" under its Act. They were successful—at that time.

[34] But *Bell* is no longer good law. *Bell* was overruled in *Halifax*. *Halifax* is yet another reminder that preliminary forays to a reviewing court to settle statutory interpretation questions, like the one Saddle Lake is advancing here, are not allowed under the modern law of judicial review: see also *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332. Absent truly exceptional circumstances—and there are none here—Saddle Lake cannot proceed on a preliminary basis to a reviewing court and bypass the Tribunal's exclusive jurisdiction to decide first whether the complaint concerns a "service" under the *Canadian Human Rights Act* or the issue arising under section 35 of the *Constitution Act, 1982*: *C.B. Powell* at paras. 30-33. Instead, the Tribunal must decide these questions first.

[35] The Supreme Court's decision in *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 S.C.R. 257 also speaks to this situation. There, the Supreme Court held that if an administrative decision-maker has the jurisdiction to consider constitutional issues, a party cannot bypass the administrator's jurisdiction by raising them in a reviewing court. The Supreme Court also foreclosed preliminary recourse to a reviewing court to raise constitutional issues unless urgency was present. The thrust of *Okwuobi* is very much the same as *Halifax*. No one is raising urgency here, nor is there any evidence to support urgency. Because it has the jurisdiction to decide questions of law, the Tribunal has the jurisdiction to decide issues under section 35 of the *Constitution Act, 1982*: *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585 at para. 36; and for a specific application of this, see *Ermineskin Cree Nation v. Canada*, 2005 ABQB 76, [2006] 5

W.W.R. 528 at paras. 83-86. Here, the Tribunal should be allowed to decide this issue at first instance.

[36] As mentioned above, Saddle Lake also challenges the Commission's screening and referral decision under subsection 44(3) of the *Canadian Human Rights Act*: see paras. 30-35 of the amended notice of application. It says that Ms. Wirth could have sought judicial review in the Federal Court of the Election Panel's decision not to allow her to run for election and this was an alternate recourse available to her within the meaning of subsection 44(2) of the *Canadian Human Rights Act*. Therefore, according to Saddle Lake, the Commission had no reasonable basis for referring her complaint to the Tribunal. Instead, says Saddle Lake, the Commission should have screened out her complaint.

[37] Judicial review of this sort of discretionary referral decision is permitted: *Halifax* at paras 23-27. Saddle Lake can advance and prosecute this ground of review at this time. Quite fairly, counsel for the Commission conceded this result during oral argument.

H. Remedial consequences of the foregoing

[38] The Federal Court granted summary judgment in favour of Saddle Lake based on its own view of the merits of the legal issues that were for the Tribunal to decide. This was contrary to *Halifax*, *Okwuobi* and *C.B. Powell*. The Federal Court erred.

[39] As mentioned above, the action never should have been brought. Also the action duplicates the application. The action should be struck.

[40] The stay of the application should be lifted so Saddle Lake can prosecute the one permissible ground of review open to it (at paras. 30-35 of the amended notice of application). The other grounds are premature and should be struck.

[41] This Court is able to grant all of this relief. It is granting the relief the Federal Court should have granted: *Federal Courts Act*, para. 52(*b*)(i). And it is granting relief within the scope of what the Commission sought in the Federal Court. As mentioned in paragraph 12 above, the Commission had filed no notice of motion in the Federal Court specific to shutting down the action, but had referred to such relief in a notice of motion to intervene. Nevertheless, after granting the Commission intervener status, the Federal Court considered that the Commission had in fact made a broad motion affecting the proceedings before it, received argument on the motion and dealt with it alongside Saddle Lake's motion.

[42] On top of this, in this Court the Commission seeks in its notice of appeal "such further relief as counsel may request and this Honourable Court may permit." Finally, provided this Court affords the parties procedural fairness, it can fix proceedings that are contrary to law, miscast, chaotic, or any and all of these things: *Fabrikant v. The Queen*, 2018 FCA 224 at para. 26 and cases cited therein (plenary powers to regulate proceedings); Rule 3 of the *Federal Courts Rules*.

I. Proposed disposition

[43] Therefore, I would allow the appeal in part, set aside the judgment dated February 5, 2018 of the Federal Court in file T-364-14, grant the Commission's motion in part, dismiss Saddle Lake's summary judgment motion, dismiss the action in file T-364-14, lift the stay of the application in file T-504-13 and strike out the grounds in paras. 4-7, 22-29 and 36-40 of the amended notice of application. The Commission does not seek its costs.

[44] The striking out of the grounds in the amended notice of application is without prejudice to Saddle Lake's ability to seek judicial review of the decision of the Tribunal on these grounds at the appropriate time, in accordance with *Halifax*, *Okwuobi* and *C.B. Powell.*

[45] Given the long period that has elapsed—an election held eight years ago and undoubtedly changed circumstances during that time—the parties might give some consideration to consenting to an order expediting what is now a single-ground application for judicial review in file T-504-13. And if the judicial review is dismissed and the Tribunal's inquiry proceeds, the Tribunal might wish to consider whether the inquiry is still warranted and, if so, how it might streamline and expedite it. For example, in order to expedite matters, it might consider prioritizing issues that would determine the matter one way or the other.

"David W. Stratas"

J.A.

"I agree
Johanne Gauthier J.A."

"I agree
David G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-83-18
APPEAL FROM A JUDGMENT OF JUSTICE PHELAN OF THE FEDERAL COURT DATED FEBRUARY 5, 2018, IN T-364-14	
STYLE OF CAUSE:	CANADIAN HUMAN RIGHTS COMMISSION v. SADDLE LAKE CREE NATION, CHIEF AND COUNCIL, ON THEIR OWN BEHALF AND ON THE BEHALF OF ALL THE MEMBERS OF SADDLE LAKE CREE NATION, AND THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	December 11, 2018
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	GAUTHIER J.A. NEAR J.A.
DATED:	DECEMBER 13, 2018

APPEARANCES:

Brian Smith	FOR THE APPELLANT
Brooke Barrett Kenneth E. Staroszik, Q.C.	FOR THE RESPONDENT, SADDLE LAKE CREE NATION

SOLICITORS OF RECORD:

Legal Services Division Canadian Human Rights Commission Ottawa, Ontario	FOR THE APPELLANT

Rae and Company
Calgary, Alberta

Wilson Laycraft
Calgary, Alberta

FOR THE RESPONDENT,
SADDLE LAKE CREE NATION