Federal Court of Appeal | Cour d'appel fédérale

Date: 20190918

Docket: A-283-19

Citation: 2019 FCA 233

[ENGLISH TRANSLATION]

CORAM: **BOIVIN J.A.**
RIVOALEN J.A.
LOCKE J.A.

BETWEEN:

DAVID LESSARD-GAUVIN

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Motion dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 18, 2019.

REASONS FOR ORDER: LOCKE J.A.
CONCURRED IN BY: BOIVIN J.A.
RIVOALEN J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20190918

Docket: A-283-19

Citation: 2019 FCA 233

CORAM: **BOIVIN J.A.**
RIVOALEN J.A.
LOCKE J.A.

BETWEEN:

DAVID LESSARD-GAUVIN

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER

LOCKE J.A.

I. Facts and proceedings

[1] This case concerns a motion by the Respondent to dismiss the notice of appeal.

[2] This appeal follows to a Federal Court decision (Justice Mosley) dated July 24, 2019, that dismissed a motion by the Appellant seeking to: (i) have the award of costs reviewed (under

section 414 of the *Federal Courts Rules*, SOR/98-106 [the Rules]); and (ii) obtain an order to compel a person to appear for contempt of court for making a false statement or committing perjury.

[3] With respect to the award of costs, the Federal Court noted that its intervention was warranted only if the assessment officer (the Officer) had erred in principle or the amount of the award is so inappropriate or unreasonable as to suggest an error in principle (*McMeekin v. Canada (Human Resources and Skills Development)*, 2012 FC 58 at paragraphs 4–5; *Butterfield v. Canada (Attorney General)*, 2008 FCA 385 at paragraph 8). The Federal Court also noted that it should intervene only in "the plainest cases" (*Apotex Inc. v. Merck & Co. Inc.*, 2008 FCA 371 at paragraphs 16–17).

[4] The Appellant had submitted that the Officer had erred in applying a unit value of $150 for the purposes of the assessment (the value in effect on the day of assessment) as opposed to $140 (the value in effect as of the day of the judgment awarding costs). The Federal Court dismissed that argument, citing the consistent doctrine of the federal courts in this regard (*Rogers Communications Incorporated v. Buschau*, 2012 FCA 100 at paragraphs 9, 14, 22 [*Rogers*]; *Horn v. Canada*, 2010 FC 501 at paragraph 26; *Ferme avicole Kiamika Inc. v. Canada (Agriculture and Agri-Food)*, 2006 FC 1392 at paragraph 3; *Doucet v. Canada (Attorney General)*, 2005 FCA 268 at paragraph 5; *Kumar v. Canada*, 2006 FCA 256 at paragraph 7; *Tucker v. Canada*, 2007 FCA 133 at paragraphs 1 and 4). The Federal Court concluded that it was bound by that doctrine. Furthermore, the Federal Court rejected the Appellant's argument

that the Officer should have considered Quebec law, which holds that [TRANSLATION] "the law governing the forms and effects of the judgment is the law as of the day of the judgment."

[5] The Federal Court also rejected the Appellant's argument that the Officer breached the fundamental principles of justice by failing to take steps to obtain more details on the bill of costs after the Respondent acknowledged that its bill of costs had been prepared by a paralegal rather than a lawyer, as suggested in the bill of costs.

[6] With regard to the aspect of the motion seeking an order to compel a person to appear for contempt of Court, the Federal Court concluded that it lacked a component essential to the Appellant's argument, more specifically, that the paralegal had any intent to deceive. The Federal Court added that the Appellant had never sought to cross-examine the paralegal in question.

II. The notice of appeal

[7] Following the Federal Court decision, the Appellant filed a notice of appeal alleging the following errors:

- The Federal Court should not have considered itself to be bound by doctrine of the federal courts with regard to the standard of review applicable to the Officer's decision, and the Federal Court should have applied the same standard of review as that which applies to the decisions of prothonotaries;
- The Federal Court failed to apply all the legal principles applicable in the determination of the appropriate date for the unit value to apply in the assessment of costs, and, more specifically, the Federal Court did not consider the effect of the Supreme Court of Canada's decisions in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 [*Bedford*] and *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 [*Carter*], regarding the principle of *stare decisis*;

- The Federal Court erred by failing to recognize a breach of procedural fairness by the Officer.

III. The Respondent's motion to dismiss the notice of appeal

[8] In the written submissions filed in support of the motion, the Respondent argues that the Court has the inherent authority to strike a notice of appeal when it is plain and obvious that the appeal cannot succeed (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Canada (Citizenship and Immigration) v. Arif*, 2010 FCA 157 at paragraph 9). The Appellant does not challenge that argument.

[9] The Respondent submits that the test for striking out the notice of appeal is met in this case. The Respondent argues that, for each error alleged in the notice of appeal, the Appellant's position is unfounded and/or vague, and it is plain and obvious that the appeal cannot succeed.

IV. The Appellant's reply to the motion

[10] In reply, the Appellant insists that the threshold for striking out the notice of appeal is very high. He also cites the following excerpt of the decision in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paragraph 21:

> The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[11] The Appellant also cites *Bedford* and *Carter*, including the following excerpt at paragraph 44 of *Carter*:

> The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 42).

[12] Thus, the Appellant submits that the presence in a notice of appeal of a "new legal issue" or a "change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate'", should automatically cause a motion to strike to fail.

[13] With regard to the standard of review that applies to the Officer's decision, the Appellant submits that the Federal Court of Appeal's decision in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*], which addressed the standard of review for the decisions of prothonotaries, changed the circumstances and fundamentally shifted the parameters of the debate, as set out in *Bedford* and *Carter*. According to the Appellant, the Federal Court erred by refusing to acknowledge this change and to reconsider the applicable doctrine. The Appellant argues that the standard of review that applies to the decisions of prothonotaries should also apply to the decisions of assessment officers.

[14] With regard to the relevant date for determining the unit value for the award of costs, the Appellant's argument is that the Federal Court should have applied a pan-Canadian rule regarding the interpretation of transitional law, including the Quebec case law holding that

[TRANSLATION] “the law governing the forms and effects of the judgment is the law in force as of the day of the judgment.” He argues that the Federal Court should have ruled that the Officer had erred in basing the unit value on the assessment date. The Appellant notes that the Federal Court acknowledged that the doctrine of the federal courts on this subject does not discuss the applicable legal principles. The Appellant also submits that the date relevant to the unit value for an assessment of costs is a question of law (or of principle), and the Federal Court therefore should have intervened.

[15] With regard to the issue of procedural fairness, the Appellant submits that the Federal Court made two errors: (i) it confined the issue to a standard of review, and (ii) it failed to apply the required analytical framework for procedural fairness, as defined in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*]. The Appellant had asked the Officer to take steps to obtain more details on the bill of costs, which the Officer did not do. The Appellant also notes that the Officer did not mention the possibility of cross-examining the deponent, who supported the bill of costs.

V. Analysis

A. *Threshold for dismissing an appeal*

[16] The parties’ opinions do not diverge considerably on the test for striking out a notice of appeal. Refer to paragraphs [8] and [10] to [12] above.

B. *Standard of review applicable to the Officer's decision*

[17] The parties also substantially agree on the curial rules applicable to the standard of review that applies to an assessment officer's decision. I refer the reader to paragraph [3] above.

[18] The Appellant's argument on this issue is that *Hospira* fundamentally shifted the parameters of the controversy and that, according to *Bedford* and *Carter*, it follows that the appeal is not destined to fail.

[19] I am not convinced that *Hospira* fundamentally shifted the parameters of the controversy concerning assessment officers in the manner to which the Supreme Court of Canada refers in *Bedford* and *Carter*. As stated, *Hospira* concerned the standard of review that applies to the decisions of prothonotaries. In that decision, the Federal Court of Appeal was satisfied that there was a fundamental shift in the parameters of the controversy because the role of Federal Court prothonotaries had evolved to the extent that, with certain exceptions, they are "performing the same task as Federal Court Judges." The same cannot be said for assessment officers, who have a much more limited role in the Federal Court. Nothing has suggested to the Court that their role has changed in a manner that fundamentally shifts the parameters of the controversy.

[20] The reasoning in *Hospira* does not apply to assessment officers. Therefore, there is no reason to revisit the issue of the standard of review that applies to the Officer's decision. I am satisfied that it is plain and obvious that the Appellant's argument on the standard of review cannot succeed.

[21] Moreover, the errors the Appellant raises are all questions of law or of procedural fairness. Therefore, it seems that the standard of review would remain essentially unchanged even if the standard of review in *Hospira* were applied. That is precisely what the Appellant admits at paragraph 20 of his written submissions, which in itself is another reason to conclude that the Appellant's argument on the standard of review is destined to fail.

VI. Date for determining the unit value

[22] The case law is clear on the issue of the date as of which is to be determined the unit value for the assessment of costs. The Federal Court cited a number of cases holding that it is the date of the assessment that applies (see paragraph [4] above). One of those cases carries more weight because the issue of the assessment date was argued, and the Court rendered its decision precisely on this issue: (*Rogers* at paragraphs 9, 14, 22).

[23] The Appellant does not cite any case that clearly contradicts this line of cases. In my view, the Appellant's reference to Quebec case law (see paragraph [14] above) is insufficient. The Appellant does not specify that case law in his written submissions, but the Officer states in his decision that the Appellant cited *Al Sammour v. Jmour*, 2016 QCCS 46. At footnote number 22 at the end of its decision, the Superior Court states that the *Code of Civil Procedure* that was in effect at the time of the trial did not apply to the assessment of costs because, during the deliberations, it was replaced with the new Code. Even based on that citation, it is not at all clear that the appropriate date is that of the judgment awarding costs as opposed to the date of assessment of costs. That isolated case cannot in itself put in question the clear doctrine of the federal courts.

[24] I conclude that the Appellant's argument that the unit value that applies to the assessment of costs of $140 cannot succeed.

VII. Procedural fairness

[25] The Appellant's argument that the Federal Court confined the issue to a standard of review is without merit. The Federal Court clearly showed that it understood that the Appellant was entitled to procedural fairness before the Officer, and that any breach of procedural fairness would have justified his motion.

[26] The Federal Court concluded that there had been no breach of the fundamental principles of justice (including procedural fairness) by the Officer. The Federal Court stated that the Officer had a discretion to decide whether or not to issue a directive or order to obtain the additional information the Appellant was seeking. The Federal Court also noted that the Appellant had never tried to obtain that additional information through cross-examination. The Appellant cites no relevant authority to support his argument that the Federal Court erred in its conclusions. Moreover, the Appellant does not cite any authority for the proposition that the Officer was required to mention the possibility of a cross-examination.

[27] In addition, the fact that the Federal Court did not mention *Baker* in its decision does not constitute an error. The Appellant cites no authority to support his argument to the contrary. Furthermore, the Appellant does not propound any reasoning that could lead to the conclusion that an analysis of the factors set out in *Baker* could have revealed a breach of procedural fairness.

[28] Consequently, I am satisfied that the Appellant's argument that there was a breach of procedural fairness before the Officer is destined to fail.

VIII. Conclusion

[29] The Appellant is asking this Court to inform him of any lack of evidence or breach of procedure in his reply record to this motion, as well as in his notice of appeal. He cites section 60 of the Rules. I am uncertain of the nature of the information he is seeking, but I have nothing to add to the above reasons.

[30] I would grant this motion by the Respondent and dismiss the notice of appeal, with costs, in favour of the Respondent in the amount of $1,000, all-inclusive.

"George R. Locke"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Marianne Rivoalen J.A."

Certified true translation
François Brunet, revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-283-19
STYLE OF CAUSE:	DAVID LESSARD-GAUVIN v. THE ATTORNEY GENERAL OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES.

REASONS FOR ORDER:	LOCKE J.A.
CONCURRED IN BY:	BOIVIN J.A. RIVOALEN J.A.
DATED:	SEPTEMBER 18, 2019

WRITTEN SUBMISSIONS BY:

David Lessard-Gauvin	REPRESENTING HIMSELF
Marilou Bordeleau	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA