Federal Court of Appeal Cour d'appel fédérale

Date: 20210120

Dockets: A-484-19
A-485-19
A-188-20
A-189-20
A-190-20

Citation: 2021 FCA 8

[ENGLISH TRANSLATION]

CORAM: NOËL C.J.
RENNIE J.A.
LEBLANC J.A.

BETWEEN:

THE HONOURABLE GÉRARD DUGRÉ

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of the parties.

Judgment delivered at Ottawa, Ontario, on January 20, 2021.

REASONS FOR JUDGMENT: NOËL C.J.

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

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REASONS FOR JUDGMENT

NOËL C.J.

[1] This Court is called upon to answer the question raised by a direction issued in late December as to whether the above-mentioned appeals should be summarily dismissed on the ground that they are doomed to fail and therefore constitute an abuse of process.

[2] For the reasons set out below, I am of the view that the question should be answered in the affirmative and the appeals summarily dismissed.

[3] The original of the following reasons will be filed in docket A-484-19, and copies will be filed in the four other dockets.

I. BACKGROUND

[4] The Honourable Gérard Dugré (the appellant) is appealing from two Federal Court judgments striking out, on the ground of prematurity, five applications for judicial review that he filed against interlocutory decisions rendered by the Canadian Judicial Council (CJC):

- On December 13, 2019, Justice Martineau struck out two applications for judicial review concerning the CJC's treatment of two ethics complaints submitted to the Inquiry Committee on August 30, 2019 (*Dugré v. Canada (Procureur Général)*, 2019 CF 1604);
- On July 31, 2020, Justice Roy struck out three applications for judicial review concerning the CJC's treatment of ethics complaints submitted to the Inquiry Committee on October 4 and November 13, 2019, along with notices of allegations issued by that committee on March 4, 2020 (*Dugré v. Canada (Attorney General)*, 2020 FC 789).

[5] Both Federal Court judges concluded that, following a clear and consistent line of cases, the appellant cannot seek a judicial review until the administrative process is completed and all effective remedies are exhausted. Both noted that several preliminary decisions have been made in the present case but that the hearing before the Inquiry Committee have yet to begin. Furthermore, there are no exceptional circumstances that would justify the Court's intervention at this stage of the proceedings.

[6] The issue raised by the appellant in each appeal is whether the Federal Court judges erred in preliminarily striking out the applications for judicial review on the ground of prematurity.

– *Issuance of the directions*

[7] As a general rule, appeals before this Court are heard based on the availability of the parties. One of the Chief Justice's duties is to set the hearing dates when the parties are unable to agree on a date.

[8] Further the appellant's insistence that his appeals be heard at the time when the CJC Inquiry Committee was scheduled to hold its hearing in Montréal between January 18 and February 5, 2021, the Court was called upon to review the five appeal books and memoranda.

[9] After conducting this review, the Court advised the parties that no date would be set at this time and issued a direction inviting them to present written submissions on the question as to whether the appeals are doomed to fail.

[10] The inquiry has since been postponed due to the sanitary measures taken by the Government of Québec. Following this postponement, the appellant reiterated his request to be heard on the merits during the period when the Inquiry Committee was scheduled to hold its hearing. It is not opportune to accede to this request. The Court is now in a position to answer the question raised by the directions and if the appeals are doomed to fail, as I believe to be the case, they should be disposed of summarily.

– *Directions*

[11] The first direction, issued on December 24, 2020, reads in part as follows:

> . . .
>
> [TRANSLATION]
> Pursuant to the Court's full authority to manage its proceedings as well as pursuant Rules 4 and 74, this Court may order that an appeal be disposed of summarily where it is doomed to fail. Pursuit of such an appeal constitutes an abuse of process. See, for example, *Canada (National Revenue) v. McNally*, 2015 FCA 195, at paragraphs 8-10; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, at paragraph 36; *Mazhero v. Fox*, 2014 FCA 226, at paragraph 9; *National Railway Company v. BNSF Railway Company*, 2016 FCA 284.
>
> The Court orders the parties to file written submissions on the question as to whether the above-mentioned appeals are doomed to fail under the criterion for dismissal set out in *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332.
>
> . . .
>
> [Emphasis added]

[12] In his response, the appellant did not address the question raised and contented that the Court composed of a single judge did not have the authority either to raise or to answer this question. In the interest of procedural fairness, the Court issued a second direction on January 4, 2021, to clarify the meaning of the first and to invite again the appellant to provide his submissions on the answer to be given to the question raised. This second direction reads in part as follows:

> [TRANSLATION]
> The Court thanks the appellant for his letter of December 31, 2020, in response to the Court's direction issued on December 24, 2020.
>
> In this letter, the appellant appears to be acting based on a misunderstanding as to the nature of the review conducted by the Court. In the interest of procedural

fairness, the Court wishes to correct this misunderstanding and provide the appellant another opportunity to present his submissions.

Following a well-established practice, any judge of this Court may ask a party to show that his or her appeal is not doomed to fail. The judge raising this question is not thereby biased, nor does he or she express an opinion on the answer to be given. The purpose of the exercise is to obtain fulsome submissions on the answer to be given to the question raised. For this reason, I consider it important that the appellant be given another opportunity to present his point of view.

As is the case in any appeal, only a panel of three judges can dismiss an appeal on the ground that it is doomed to fail. The judge who raised the question may sit on the panel responsible for reviewing it. See *Ignace v. Canada (Attorney General)*, 2019 FCA 239, at paras. 14 to 17; *Rock-St Laurent v. Canada (Citizenship and Immigration)*, 2012 FCA 192.

The question raised as to the burden of proof does not arise. The burden rests on the appellant the same way as if the question were raised by either of the judges assigned to hear the appeal at the outset of the hearing. It was after noting the unavailability of the parties before the resumption of the inquiry before the Canadian Judicial Council (CJC) on January 18, 2021, and the appellant's insistence that the appeals be heard on dates coinciding with those reserved for the hearing before the CJC (i.e., between January 18 and February 5, 2021) that the Court raised the question on a preliminary basis. The Court did so to allow the question to be answered before considering whether the inquiry calendar should be changed.

The appellant also raises the appearance of conflict that may result from the fact that, as Chief Justice, I am a member of the CJC, the entity whose decisions are subject to the appeals at issue. I confirm that I am open-minded with respect to the answer to be given to the question raised.

I add that, mindful of the fact that the Federal Court of Appeal hears appeals from decisions of the Federal Court, which in turns reviews disciplinary decisions of the CJC, and being also mindful of the code of conduct of federally appointed judges, which suggests that I avoid any conduct that might prevent me from performing my judicial functions, I refrain from participating in any CJC activity directly or indirectly pertaining to the judicial discipline process, including the activities undertaken in relation to the appellant in this case. An informed observer aware of these measures would be satisfied that there is no appearance of conflict.

All of the submissions set out in the letter of December 31, 2020, as well as any additional submissions concerning the practice of the Court or the jurisdiction of a Court composed of a single judge to raise the question as to whether the appeals are doomed to fail will be submitted to the panel responsible for reviewing the question.

> The Court therefore extends a second invitation to the appellant to respond to the question raised in the direction of December 24, 2020. The Court acknowledges that in so doing, the appellant is not waiving his submissions concerning jurisdiction.
>
> . . .

[13] The appellant's second response and his reply have since been received. The appellant maintains that the directions have no legal basis and that, in any case, the Court should not answer the question raised, since it is in a conflict of interest situation. The arguments raised by the appellant, in no particular order, are as follows:

- The Court composed of a single judge does not have jurisdiction to raise the question as to whether the appeals are doomed to fail and should be summarily dismissed;
- The Court composed of three judges does not have the authority to summarily dismiss the appeals where the question is raised in this manner;
- The simple fact of raising the question shows bias with respect to the answer to be given;
- Moreover, the participation of the Chief Justice in the appeal process gives rise to a real or apparent conflict of interest in that he is a member of the CJC;
- Only a duly made motion to dismiss could have enabled the Court to consider the question raised by the directions and to submit it to a panel of three judges to provide an answer thereto;
- The fact that the question was raised by the Court of its own initiative unduly shifts the burden of proof.

[14] Furthermore, if the directions were validly issued and the Court is not prevented from acting or otherwise burdened by a conflict of interest, the appellant maintains that the appeals are not doomed to fail. In this regard, he submits that *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332 [*C.B. Powell*], on which Martineau J. and Roy J. both relied in striking out the applications for judicial review on the ground of prematurity, is no longer good law in view of decision of the Supreme Court in *Halifax*

(Regional Municipality) v. Nova Scotia (Human Rights Commission), 2012 SCC 10, [2012] 1 S.C.R. 364 [*Halifax*]. According to the appellant, it is clear from *Halifax* that only a judge called to rule on the merits could have dismissed the applications for judicial review on the ground of prematurity. It follows that the appeals are not doomed to fail.

– *Institutional bias*

[15] Before proceeding to the analysis, I reiterate that I have approached this case with an impartial and open mind with respect to the appellant, the questions he raises before the CJC and the answer to the question raised by the first direction. I have always remained at arms' length from any CJC activities concerning the appellant, as I do scrupulously with respect to all disciplinary complaints from their filing until this Court renders a judgment or the right to appeal is exhausted.

[16] That is the approach followed by any CJC member who presides over a court that exercises a review or appellate role over disciplinary decisions of the CJC and desires to preserve his or her independence with respect to these decisions. Given this measure, an informed observer would understand that the mere fact that I am a member of the CJC by virtue of the office that I hold does not give rise to an appearance of conflict.

II. ANALYSIS

[17] For the purposes of the analysis, the Court considered the record as constituted in each appeal, the memoranda of fact and law submitted by the parties as well as the written

submissions received after the directions were issued. The Court also accepted as proven the facts alleged by the appellant in support of its appeals.

[18] In order to answer the question raised by the Court, it is necessary to address two main issues: first, this Court's jurisdiction to summarily dismiss an appeal and, second, the doctrine of prematurity, which underlies the principle of non-interference by the courts in ongoing administrative proceedings.

A. *This court's jurisdiction to summarily dismiss an appeal*

[19] This Court has jurisdiction to summarily dismiss an appeal. Although the *Federal Courts Rules*, SOR/98-106 (the Rules) do not contain any specific provision allowing for the summary dismissal of an appeal, the Court has exercised this jurisdiction for decades (*David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.), at page 600).

[20] This power stems from the Court's plenary jurisdiction (*Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 443 N.R. 378, at para. 36; *Lee v. Canada (Correctional Service)*, 2017 FCA 228 [*Lee*], at para. 6). This Court has not only the powers conferred by statute but also the powers necessary for its effective functioning (*Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 224 N.R. 241; *Lee*, at paras. 2, 7-15; *Fabrikant v. Canada*, 2018 FCA 171, at para. 3 and the cases cited therein). As the Court explains in *Lee*, the Federal Courts, as part of the judicial branch of the government, must have the powers necessary to manage their own proceedings (*Lee*, at para. 8).

[21] This power also manifests itself in the Rules through the combined effect of Rule 74 (removal of proceedings brought without jurisdiction), Rule 4 (the gap rule) and Rule 55 (power to vary a rule, in this case Rule 74, in "special circumstances").

[22] In exercising this prerogative, this Court has recognized that appeals doomed to fail may be subject to summary dismissal based on its plenary powers to manage its proceedings (*Lee*, at para. 15). Appeals that are doomed to fail but nonetheless remain on the roll, waste judicial resources and impair access to justice for those who have a meritorious case (*Hébert v. Wenham*, 2020 FCA 186 [*Wenham*], at para. 8; *Fabrikant v. Canada*, 2018 FCA 224, at para. 25).

[23] This power to summarily dismiss appeals that are doomed to fail has been exercised on numerous occasions: *Canada (National Revenue) v. McNally*, 2015 FCA 195, at paras. 8-10; *Mazhero v. Fox*, 2014 FCA 226, at para. 9; *Canadian National Railway Company v. BNSF Railway Company*, 2016 FCA 284; *Bernard v. Canada (Professional Institute of the Public Service)*, 2019 FCA 236, at paras. 8-10.

[24] In each of these cases, the Court composed of a single judge raised the question as to whether the proceedings should be dismissed in a summary manner. As in the present case, the Court ruled on the issue after inviting the parties to express their point of view on the answer to be given to the question raised.

[25] As explained in the direction of January 4, 2021, when the answer to be given to the question raised might result in the disposition of an appeal, as in the present case, only a panel of

three judges may be called upon to decide the question pursuant to section 16 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

– *Response to appellant's contentions*

[26] In the light of these principles, I must comment briefly on each of the appellant's arguments.

[27] First, the appellant asserts that the simple fact of raising a question that could lead to a dismissal is indicative of a closed mind with respect to the answer to be given. As the Court explains in *Ignace v. Canada (Attorney General)*, 2019 FCA 239, at paras. 14-17, a judge may, after reviewing a record, realize that the proceeding may be doomed to fail and ask the parties to make submissions on the issue. This is nothing more than pointing to a question that requires clarification. Contrary to the appellant's assertions, asking the question does not amount to answering it, and it is with an open mind that the Court invites the parties to set out their respective point of view.

[28] The appellant further argues that only a motion to strike filed by the respondent could have allowed the Court to submit the question to a panel of three judges and that by raising the question of its own initiative, the Court is unduly shifting the burden of proof from the respondent to the appellant.

[29] As set out above, the Court can manage its own proceedings and, where appropriate, get rid of abusive recourses without having to wait for a party to take this initiative.

[30] The answer to the question raised by the Court does not turn on the burden of proof borne by one party or the other in an *inter partes* proceeding. Where the Court comes across an apparent irregularity that is potentially fatal, it invites the parties to set out their position on the issue. As should be, the party that brought the proceeding that is put at risk by the question is invited to make its arguments first and, is thereby given the right of reply. The proceeding will be allowed to follow its course unless the Court is able to show, based on a cogent demonstration, that it is doomed to fail.

[31] This approach is respectful of the principles of procedural fairness and is the only way in which Court can play an active role in managing its proceedings. The appellant has not convinced me that the decisions endorsing this practice over the years are manifestly wrong within the meaning of *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149.

[32] I therefore reject the appellant's argument that the procedure followed in this case – i.e. referral to a panel to determine whether the appeals should be summarily dismissed – is improper or that this Court does not have jurisdiction to order a dismissal in such a manner.

B. *Are the appeals doomed to fail?*

[33] Before answering the question raised, it must first be determined whether it was open to Martineau J. and Roy J. to strike out the applications for judicial review on the ground of prematurity.

– *Doctrine of prematurity*

[34] All of the applications for judicial review in this case relate to CJC decisions that are interlocutory. Both Federal Court judges held that these applications should be struck out on the basis of prematurity. The legal principle applicable in such matters and its rationale are grounded in the principles set out in *C.B. Powell*:

> The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point [citation omitted].
>
> Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed or until the available, effective remedies are exhausted.
>
> This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway . . .
>
> (*C.B. Powell*, at paras. 30 to 32).

[35] As it is clear from the above passage, an application for judicial review against an interlocutory administrative decision can be brought only in “exceptional circumstances.” Such circumstances are very rare and require that the consequences of an interlocutory decision be so

"immediate and radical" that they call into question the rule of law (*Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17, [2015] 4 F.C.R. 467 [*Wilson*], at paras. 31-33, set aside on a different point, 2016 SCC 29, [2016] 1 S.C.R. 770; *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139, 473 N.R. 283, at paras. 56-60 [*Budlakoti*]).

[36] This Court has analogized these circumstances to those that can justify the issuance of a writ of prohibition; absent of such circumstances, the application must be subject to summary dismissal (*Wilson*, at para. 33; *Forner v. Professional Institute of the Public Service of Canada*, 2016 FCA 35, at paras. 14-15). No exception is made: even constitutional questions or questions qualified as "jurisdictional" cannot attract interlocutory relief (*C.B. Powell*, at paras. 39-46; *Black v. Canada (Attorney General)*, 2013 FCA 201, 448 N.R. 196, at paras. 18-19).

[37] In short, the non-availability of interlocutory relief is next to absolute. A less stringent criterion would only encourage premature forays into courts and a resurgence of the ills identified in *C.B. Powell*. Hence, certain recent attempts by the Federal Court to restate the settled test by refining criteria for exceptions are ill-advised and should not be viewed as authoritative (see *Whalen v. Fort McMurray No. 468 First Nation*, 2019 FC 732, [2019] 4 F.C.R. 217, at paras. 20-21 and subsequent Federal Court cases). Although well-intentioned, these attempted restatements only serve to muddy the waters and compromise the rigour of the principle of non-interference.

[38] In addition, the case law bearing on the unacceptability of premature judicial review applications makes it unequivocally clear that the Court may summarily dismiss a proceeding of

its own motion (*Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75, at para. 22; *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2017 FCA 241, at paras. 47 to 56).

– *Standard of review*

[39] In addressing the question whether the appeals are doomed to fail, the applicable standard of review must be determined. Based on this standard, an argument appearing sound in theory may, in reality, have no chance of success (*Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 224, [2020] 1 F.C.R. 362, at para. 16; see also *Apotex Inc. v. Allergan Inc.*, 2020 FCA 208, at paras. 9-10; *Wenham*, at paras. 11-14).

[40] In the present case, this Court is not seized of a judicial review application challenging interlocutory administrative decisions rendered by the CJC. At stake are five appeals brought against Federal Court decisions striking out applications for judicial review; the appeals do not seek to quash the CJC decisions.

[41] The standard of review is consequently the standard of appeal prescribed in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*] (see *Budlakoti*, at paras. 37-39; *Canada v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209, at para. 88; *Apotex v. Canada (Health)*, 2018 FCA 147, 157 C.P.R. (4th) 289, at paras. 57-61).

– *Answer to the question raised by the Court*

[42] According to *Housen*, the application of the law to the facts of this case raises a question of mixed fact and law subject to the standard of palpable and overriding error. This is a very stringent standard (*Benhaim v. St. Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at para. 38, citing *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286, at para. 46; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R: 344, at paras. 60-74).

[43] The appellant is not raising any error of this nature.

[44] The appellant grounds his arguments on his reading of *Halifax* according to which the question of prematurity can only be decided by the court seized of the merits of the judicial review application. In the present case, Martineau J. and Roy J. were not seized with the merits and consequently could not dispose of the applications summarily on the basis that they were premature.

[45] The appellant is suggesting, more or less, that this Supreme Court decision narrows the scope of *C.B. Powell*. However, there is nothing in *Halifax* to suggest that a judge hearing a motion to strike an application for judicial review cannot consider its prematurity and proceed to strike it out on that ground alone.

[46] *Halifax* applies the principles propounded in *C.B. Powell* in the more limited context of the review of an application for judicial review on the merits. It does not narrow its scope. In this

regard, it cites with approval *C.B. Powell* on five occasions, reaffirming the principle of non-interference of the courts in ongoing administrative processes other than in exceptional circumstances. Indeed, courts across the country have continued to apply *C.B. Powell* after the decision in *Halifax* was rendered (see *Pridgen v. University of Calgary*, 2012 ABCA 139, 350 D.L.R. (4th) 1; *Saskatoon (City) v. Wal-Mart Canada Corp.*, 2019 SKCA 3, [2019] 3 W.W.R. 284; *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541, 355 D.L.R. (4th) 518; *British Columbia Investment Management Corporation v. Canada (Attorney General)*, 2016 BCSC 1803, 401 D.L.R. (4th) 729; *Student X v. Acadia University*, 2018 NSSC 70).

[47] Contrary to the appellant's contention, there is no jurisprudential inconsistency between *C.B. Powell* and *Halifax*. *C.B. Powell* remains authoritative and dictates the outcome of the present case, each of the appeals being premature on its own face.

[48] Indeed, none of the other arguments raised by the appellant, both in the memoranda and the written submissions in response to the directions, points to circumstances directly or indirectly resembling the exceptional circumstances referred to in *C.B. Powell*. While the existence and conduct of removal proceedings may be damaging to the appellant's reputation, that is the nature of any removal proceeding (*Newbould v. Canada (Attorney General)*, 2017 FCA 106, [2018] 1 F.C.R. 590, at paras. 31-34). The appellant has failed to show how his particular situation is different from that of any other judge subjected to a removal proceeding.

[49] In the absence of any circumstance that might be considered exceptional within the meaning of the case law, there is no basis for this Court to question the decisions under appeal. It follows that these appeals are necessarily doomed to fail and should be dismissed.

III. DISPOSITION

[50] I therefore propose that the appeals be summarily dismissed. Needless to say, this dismissal has no impact on the appellant's right to challenge, via judicial review upon completion of the administrative process, any decision taken by the CJC during the proceeding or in its report.

[51] Since the respondent did not seek costs, none should be awarded.

"Marc Noël"
Chief Justice

"I agree.
Donald J. Rennie, J.A. "

"I agree.
René LeBlanc, J.A. "

FEDERAL COURT OF APPEAL

COUNSEL OF RECORD

DOCKETS:	A-484-19, A-485-19, A-188-20, A-189-20, A-190-20

MATTER DEALT WITH IN WRITING WITHOUT APPEARANCE OF THE PARTIES

STYLE OF CAUSE:	THE HONOURABLE GÉRARD DUGRÉ V. THE ATTORNEY GENERAL OF CANADA
REASONS FOR JUDGMENT:	NOËL C.J.
CONCURRED IN BY:	RENNIE J.A. LEBLANC J.A.
DATED:	JANUARY 20, 2021

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