Federal Court  Cour fédérale

Date: 20101129

Docket: T-279-10
T-280-10

Citation: 2010 FC 1195

Ottawa, Ontario, November 29, 2010

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ESGENOÔPETITJ (BURNT CHURCH) FIRST NATION

Applicant

and

ALMA BOUCHER
IN HER CAPACITY AS INSPECTOR,
HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA,
LABOUR PROGRAM,
ANDREW CURTIS BARTIBOGUE,
AND E. THOMAS CHRISTIE, Q.C.

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant is seeking to appeal Prothonotary Morneau's Order granting the Respondent's motion to strike the application for judicial review and dismissing the Applicant's motion under Rule 318.

[2] For the reasons that follow, I agree with the Respondent that this motion should be dismissed on the basis that it is an abuse of process. The Applicant should not be allowed to maintain multiple proceedings dealing with the same issues before the Court, with the attending risk of conflicting decisions that could only bring the administration of justice into disrepute. A copy of these reasons and order shall be placed in both files T-279-10 and T-280-10.

I. Background

[3] The underlying judicial review application stems from a complaint of unjust dismissal made by the Respondent, Curtis Bartibogue, against the Applicant, Esgenôpetitj (Burnt Church) First Nation. Alma Boucher, an inspector with the Labour Program (the "Inspector"), was assigned to the file.

[4] In the section of the unjust dismissal complaint form that asked him to specify what employment positions he held with the Applicant, the Respondent Bartibogue wrote in "band counsellor", which is an elected position, not subject to the provisions of the unjust dismissal complaint process of the *Canada Labour Code*, R.S., 1985, c. L-2.

[5] The Inspector attempted to settle the matter between the parties. She forwarded the complaint form to the Applicant and requested reasons for the Respondent Bartibogue's dismissal. The Applicant did not respond. The Inspector determined that the parties would not be able to settle the matter. The Respondent Bartibogue then requested the appointment of an adjudicator.

[6] As mandated under the legislation, the Inspector prepared a report for the Minister and forwarded a copy of the complaint to the Minister for the appointment of an adjudicator. On the copy of the complaint form that was forwarded to the Minister, the Inspector had added the words “youth coordinator” and “fisheries manager” to the job title portion of the complaint form filled out by the Respondent Bartibogue to clarify the employment positions he held with the Applicant.

[7] The Minister appointed the Adjudicator to hear and adjudicate on the complaint. At the first oral hearing before the Adjudicator on January 27, 2010, the Applicant became aware of the fact that the Adjudicator had been provided with an “altered” version of the Respondent Bartibogue’s complaint. He also learned that the Respondent Bartibogue had a copy of this “altered” form. He requested an adjournment on this basis, which was granted.

[8] Applicant’s counsel then contacted the Inspector and inquired as to the addition of the job titles on the complaint form. The Inspector explained that the notations were made to reflect the Respondent Bartibogue’s employment history with the Applicant. The Inspector also explained that at some time after she made the notations to the complaint form, the Respondent Bartibogue contacted her and requested a copy of his complaint form for the purposes of the adjudication. Accordingly, she sent him the “altered” version of the complaint form. She apologized for not sending a copy of the “altered” form to the Applicant as well.

[9] On February 26, 2010, the Applicant commenced a judicial review application challenging the Inspector’s “decision” to submit the altered complaint form to the Minister (file T-279-10). The Applicant also brought a judicial review application challenging the Minister’s “decision” to

appoint an adjudicator to hear and determine an “altered” version of the complaint (file T-280-10). Among the remedies being sought in both cases was an order of certiorari respectively seeking the quashing of the Inspector’s and the Minister’s “decision” to submit an altered form, declaratory relief that the Inspector and the Minister committed a jurisdictional error, and an interim order staying the adjudication.

[10] No stay motion was brought by the Applicant to halt the adjudication, and the adjudication was completed on March 23, 2010.

[11] On March 16, 2010, the tribunal record, which was certified by the Inspector, was filed with the Court in file T-279-10. Applicant’s counsel challenged the contents of the Certified Tribunal Record (“CTR”) by way of letter to the Court. In conjunction with early efforts to resolve this matter, the Respondent “Alma Boucher in her capacity as Inspector” addressed the Applicant’s concerns regarding the contents of the CTR.

[12] In letters dated April 14th, 15th, and 20th, the Respondent advised the Applicant of his concerns with respect to having these two judicial review applications underway before a final decision on the substantive merits of the case has been rendered by the Adjudicator. The Respondent also advised that if the Applicant was unwilling to discontinue these applications, motions to strike would be pursued on both applications.

[13] On April 22, 2010, Applicant's counsel advised that his client was not prepared to discontinue these applications and would be proceeding with a motion on court file number T-279-10, challenging the CTR.

[14] The Respondent proceeded with the motions to strike and responded to the Applicant's Rule 318 motion. The Applicant did not file submissions on the motions to strike.

[15] By Order dated May 18, 2010, Prothonotary Morneau granted the motions to strike on both files and dismissed the Applicant's motion under Rule 318. The Prothonotary essentially adopted all of the written representations made by the Respondent.

[16] On May 28, 2010, the Applicant filed appeals of these decisions under Rule 51 of the *Federal Courts Rules*.

[17] On May 28, 2010, the Adjudicator also released his decisions on the merits of the unjust dismissal complaint. In his decision, he addressed the merits of the Applicant's arguments regarding the effect of the Inspector's actions in making the notations on Respondent Bartibogue's complaint form.

[18] On June 25, 2010, the applicant sought judicial review of the Adjudicator's decision.

[19] The Respondent's counsel then contacted the Applicant's counsel to determine if he would be amenable to discontinuing the Rule 51 motions since he was also seeking judicial review of the

Adjudicator's decision. An offer was made to the effect that the Respondent would not seek costs in relation to the Rule 51 motions if the Applicant would discontinue prior to June 8, 2010. It appears that no reply was received to that offer. However, the Applicant's motion records on the appeals were received on June 9, 2010.

II. Issues

[20] The following issues arise on this appeal:

a) What is the appropriate standard of review on the appeal from the order of the Prothonotary?

b) Should the Applicant's motion appealing the Prothonotary's Order be dismissed on the basis that it is an abuse of process?

c) Has the Prothonotary erred in granting the motions of the Respondent to strike the applications for judicial review filed by the Applicant?

d) Has the Applicant demonstrated that the Prothonotary proceeded on a wrong principle or upon a misapprehension of the facts such that his decision on the Rule 318 motion should be reviewed *de novo*?

III. Analysis

A. *What is the appropriate standard of review on the appeal from the order of the Prothonotary?*

[21] The standard of review to be applied in an appeal of a Prothonotary's decision is well settled. A discretionary decision ought not to be disturbed on an appeal to a judge unless: a) the questions raised on the motion are vital to the final disposition of the case, or b) the prothonotary

erred in that the impugned decision is based on a wrong principle or upon a misapprehension of the facts: see *Merck & Co. Inc.* v. *Apotex Inc.*, 2003 FCA 488.

[22] Given the context and the nature of the questions raised in the appeal, there is no question that the Court must exercise its own discretion *de novo* with respect to the Prothonotary's decision on the motion to strike.

[23] The standard of review with respect to the Prothonotary's decision on the Applicant's motion under Rule 318 is different. That motion did not raise an issue that was vital to the final disposition of the case. Accordingly, the Prothonotary's decision should only be disturbed in the event this Court was to find that the Prothonotary erred or based his decision on a wrong principle of law or a misapprehension of the facts. Otherwise, his decision should be granted significant deference.

B. *Should the Applicant's motion appealing the Prothonotary's Order be dismissed on the basis that it is an abuse of process?*

[24] Counsel for the Respondent argued that it would be an abuse of process for the Applicant to pursue this appeal of the Prothonotary's decision, first because the Adjudicator has already made a determination on the substantive issues under review, and further because that decision is now the subject of another application for judicial review. I agree with this submission.

[25] Courts have the inherent power to prevent the misuse of procedure in a way that would bring the administration of justice into disrepute. This doctrine has been applied where relitigation

would violate such principles as judicial economy, consistency, finality, and the integrity of the administration of justice: see *Toronto (City)* v. *C.U.P.E., Local 79*, 2003 SCC 63.

[26] In the present case, the applicant is attempting to maintain multiple proceedings in this Court that raise the same legal issues regarding the legality and impact of the Inspector's actions in making the notations to the complaint form. The Applicant's attempt to pursue multiple applications in order to reach a favourable outcome risks bringing the administration of justice into disrepute, given the possibility of conflicting decisions from the Court on the same issue. It is also a waste of judicial resources and leads to a needless increase in legal costs for the parties forced to respond to multiple applications.

[27] Counsel for the Applicant submitted that the Adjudicator cannot question the complaint form on the basis of which he was appointed. No authority has been submitted to support this proposition, which appears to be based on a very narrow construction of s. 242 of the *Canada Labour Code*. The powers conferred on the Adjudicator by paragraph 242(2) are very broad, and there is no indication that this provision would prevent the Adjudicator from looking at the complaint itself. On the contrary, parties must be given full opportunity to present evidence and make submissions without restriction. I fail to see how an adjudicator could disregard evidence properly introduced that would have the effect of stripping him of his jurisdiction to adjudicate on a complaint.

[28] It is also an abuse of process for the Applicant to bring a Rule 51 motion challenging the Prothonotary's Order on the motion to strike in the particular circumstances of this case. Despite

being advised by counsel for the Respondent that motions to strike would be brought if the Applicant was unwilling to discontinue its applications for judicial review, the Applicant did not file submissions in response to these motions. At the hearing, counsel for the Applicant argued that he did not have instructions from his client to plead before the Prothonotary. While this may explain why counsel did not make representations, in the absence of any further explanation, it does not excuse the Applicant for having waited for so long before reacting to the Respondent's motion to strike.

[29] To condone the Applicant's behaviour would frustrate the Respondent's attempt to seek an economical and speedy resolution to the underlying application by advancing the motion to strike under Rule 369. It would also frustrate the judicial process and waste judicial resources by undermining the discretion of the Prothonotary. This approach also forces upon the Respondent the additional expense of responding to an appeal when no effort was made to defend the merits of the application at first instance.

[30] For all these reasons, this motion ought to be dismissed as an abuse of process.

C. *Has the Prothonotary erred in granting the motions of the Respondent to strike the applications for judicial review filed by the Applicant?*

[31] In any event, the Applicant's motion ought to be dismissed as the Prothonotary was correct in granting the motion to strike.

[32] First of all, this Court is clearly empowered to summarily dismiss an improper Notice of Application, either as an exercise of its inherent jurisdiction or on the basis of Rule 4 of the *Federal*

Courts Rules. That being said, a motion to strike is an exceptional remedy, especially in the context of an application for judicial review. Since such an application is meant to be dealt with summarily, it is ordinarily more proper to deal with any objection to the application in the context of the hearing on the merits, if only because a full grasp of the facts and of the context will often be necessary to deal with the objection. I agree with the Applicant, therefore, that a motion to strike will not be granted except in the most obvious and exceptional circumstances, where a notice of application is so fundamentally flawed that it has no chance of success: see, *inter alia*, *David Bull Laboratories (Canada) Inc.* v. *Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.); *Moses* v. *R.*, 2002 FCT 1088, at para. 6.

[33] Counsel for the Respondent submitted that the judicial review application was fundamentally flawed because it failed to challenge a "decision" or "matter" within the meaning of s. 18.1 of the *Federal Courts Act*. The Inspector's action in submitting the "altered" complaint form to the Minister, as opposed to the original complaint form, as the Respondent argued, had no effect or impact on the rights of the parties. Accordingly, it was not a "matter" as defined in s. 18.1 of the *Federal Courts Act* and there is allegedly no jurisdiction for this Court to intervene.

[34] I do not find this argument convincing. I agree that it is not the role of the Inspector in the context of an unjust dismissal claim to make substantive decisions regarding the merits or scope of a claim. In *Lemieux* v. *Canada*, [1998] 4 F.C. 65, the Federal Court of Appeal determined that the role of the Inspector is to receive the complaint, request reasons for the dismissal, and attempt to resolve the complaint. Where these efforts are unsuccessful, and at the request of the complainant, it is the role of the Inspector to forward the complaint to the Minister along with a report stating that efforts to resolve the matter were unsuccessful.

[35] In accordance with the statutory scheme, once the Inspector's efforts to resolve the complaint failed, the Respondent Bartibogue had a right to request the appointment of an Adjudicator, regardless of whether he had included his previous job titles on the complaint form.

[36] The determination of the substantive merits of the claim is no doubt an issue within the purview of the Adjudicator. However, the Inspector has a decision of her own to make; that is, whether to accept or reject the complaint. She must determine, pursuant to ss. 240(1) of the *Canada Labour Code*, whether the complainant has completed twelve consecutive months of continuous employment; whether he or she is a member of a group of employees subject to a collective agreement; and whether, pursuant to ss. 240(2), the complaint was made within ninety days from the date of the dismissal. The findings of the Inspector on these issues and the decision to forward or not to forward the complaint to the Minister is clearly a "decision" for the purposes of s. 18.1 of the *Federal Courts Act*: see *Canadian National Railway Company* v. *Souchereau*, 2009 FC 293, at para. 9.

[37] The fact that there was purportedly nothing illegal about the Inspector adding information to the Respondent Bartibogue's employment history gleaned from the documentation submitted in support of his claim, as the Adjudicator ultimately found, is immaterial. There may well be cases where additions made to a complaint form would be of more import. The appropriateness of an Inspector's handling of a complaint form cannot be determinative of the issue of whether it was a "matter" as defined in s. 18.1 of the *Federal Courts Act*, just as the correctness of his or her findings with respect to the requirements set out in s. 240 of the *Canada Labour Code* cannot be the criterion

to decide whether it must be considered a “decision” opening the door to an application for judicial review: see *S.S. Steamships Co. Ltd.* v. *Elvidge* (1998), 146 F.T.R. 219 (F.C.).

[38] But even if the Inspector’s actions in forwarding the “altered” complaint must be considered a reviewable “decision”, the application was still fundamentally flawed because the proper forum for the Applicant to challenge the scope and timeliness of a complaint was before the Adjudicator, not before the Federal Court. It is well established that the Court should decline jurisdiction in judicial review proceedings where the Applicant has failed to exhaust the administrative remedies available to him: see, for example, *Air Canada* v. *Lorenz*, [2000] 1 F.C. 494, at para. 14 (F.C.); *Canadian Pacific Ltd.* v. *Matsqui Indian Band*, [1995] 1 S.C.R. 3.

[39] In the present case, the Applicant had an alternate remedy by virtue of the adjudication process provided for in Part III of the *Canada Labour Code*. This process allows the Applicant an opportunity to challenge all aspects of an unjust dismissal complaint before an independent adjudicator. This is the proper forum for the Applicant to raise any substantive issues, including the argument that the Respondent Bartibogue was too late to challenge his dismissal from the position of youth coordinator because he did not write it on the complaint form within the statutory time frame.

[40] Counsel for the Applicant contended that an Adjudicator does not have jurisdiction to determine whether his own appointment (a result of the Inspector’s recommendation to the Minister) is invalid, especially if this invalidity results from the Inspector acting in excess of her jurisdiction. As previously mentioned, no authority was provided in support of this proposition. An

Adjudicator mandated to enquire under s. 242 of the Code must obviously consider whether the conditions precedent to a validly-filed complaint have been met. A validly-filed complaint is a condition precedent to the jurisdiction of such an Adjudicator: *Seaspan International Ltd.* v. *Bauer*, 2003 FCT 560 (F.C.).

[41] In fact, the Applicant did participate in the adjudication process and did present arguments regarding the legality of the Inspector's actions to the Adjudicator, whose decision was released on May 28, 2010. The Adjudicator rejected the applicant's claims regarding the legality and impact of the Inspector's actions and, on the substantive merits of the claim, found in favour of the Respondent Bartibogue. The Applicant has sought judicial review of that decision. Accordingly, the motion to strike was justified since the Applicant has already had access to an alternative administrative remedy by virtue of the adjudication process.

[42] The motion to strike was also warranted on the basis that it was premature to allow a judicial review application, which at its root challenged the scope and timeliness of an unjust dismissal claim, before a final decision was made by the Adjudicator on the merits of the claim. There is a longstanding rule in the federal Courts that absent exceptional circumstances, there is no immediate judicial review of interlocutory matters pending a final determination by the decision maker: see, for ex., *Szczecja* v. *Canada* (1993), [1993] F.C.J. No. 934 (F.C.A.), at para. 4; *CHC Global Operations* v. *Global Helicopter Pilots Assn.*, 2008 FCA 344; *Lundbeck Canada Inc.* v. *Canada (Minister of Health)*, 2008 FC 1379 (F.C.), at paras. 27-28; *Fairmount Hotels Inc.* v. *Canada (Corportions)*, 2007 FC 95 (F.C.), at para. 9.

[43] In the present case, the Inspector's actions in adding the background information to the complaint form and in submitting it along with her report were interlocutory matters that did not determine the legal issues between the parties. Under the statutory scheme, all of the substantive decisions regarding the merits of the complaint, including its scope and timeliness, are left to the adjudicator.

[44] Allowing the judicial review of interlocutory matters unnecessarily delays the final determination of the claim and fragments the issues, which results in increased legal costs to the parties forced to respond to multiple interlocutory applications. This is particularly apparent in the present case, where there were two judicial review applications commenced, which in essence both challenged the scope and timeliness of the complaint, before the Adjudicator even made a final decision on the issue. This is certainly not a course of conduct to be encouraged. The whole scheme of the unjust dismissal provisions in the *Canada Labour Code* aims at a speedy resolutions of such claims. Allowing judicial review of interlocutory matters can only frustrate Parliament's intention.

[45] The proper approach would have been to await the decision of the Adjudicator and then, if the Applicant disagreed with his assessment of the claim, consider seeking judicial review at that time. This would have ensured that all of the substantive issues surrounding the complaint were determined in one forum on the basis of a complaint record. The Applicant's concerns regarding the scope and timeliness of the complaint might even have been rendered moot, depending on the outcome of the adjudication.

[46] The release of the Adjudicator's decision and the subsequent judicial review application advanced by the Applicant further highlights the fact that there is and there was a remedy available to the Applicant in the event he disagreed with the findings of the Adjudicator with respect to the impact of the Inspector's actions.

[47] Accordingly, the motion to strike was also warranted on the basis that there were no special circumstances to justify deviating from the general principle preventing immediate judicial review of interlocutory matters.

D. *Has the Applicant demonstrated that the Prothonotary proceeded on a wrong principle or upon a misapprehension of the facts such that his decision on the Rule 318 motion should be reviewed de novo?*

[48] Pursuant to Rule 318 of the *Federal Courts Rules,* counsel for the Applicant requested a number of documents that were not part of the Certified Tribunal Record certified by the Inspector. He requested, among other things, the following:

1) Documents, records or materials containing or referring to conversations between the Inspector and the Respondent Bartibogue relating to his alleged dismissal;
2) Documents, records or materials containing or referring to information exchanged between the Respondent Bartibogue and Denis Haché, a person employed in the same office as Inspector Boucher whose name was affixed to the Respondent's complaint, and particularly concerning the issue of whether an elected Indian Band Councillor could file a complaint of unjust dismissal pursuant to s. 240 of the *Canada Labour Code*; and

3) Documents, records or materials of, or relating to, communications between Denis Haché and the Respondent Inspector Boucher concerning the complaint.

[49] In letters sent to counsel for the Applicant, counsel for the Respondent Inspector indicated that the Inspector did not keep notes detailing her discussions with the complainant, and added that the Inspector recalled confirming verbally with Mr. Bartibogue that he had worked as a fisheries manager and youth coordinator, which in turn corresponded to the Inspector's understanding of his past employment with the Applicant based on her review of the documentary evidence submitted in support of the claim.

[50] As for the questions surrounding Denis Haché, counsel for the Respondent was able to confirm with her client that Mr. Haché had been working as an Early Resolution Officer for the Labour Program, and that it was likely in that capacity that his name was written on the complaint form when it was received in the office so it would be forwarded to him internally. Counsel for the Respondent also told counsel for the Applicant that the Inspector had confirmed that Mr. Haché's early involvement in this matter played no role in her decision to make the notations on the form.

[51] The Respondent therefore attempted to address the Applicant's request for the production of further documentation by advising that much of the material requested did not exist. The Respondent also attempted to clarify the fact that Denis Haché's preliminary involvement in the file as an Early Resolution Officer had no connection to the Inspector's involvement in the file or to her actions in making the notations to the form and sending it to the Minister. It is clear that the Applicant's request exceeded the parameters of a permissible Rule 317 request: the documents

sought were not before the Inspector when she submitted the “altered” form to the Minister, some did not even exist and, in many instances, were completely unrelated to the matter under review.

[52] There is jurisprudence to suggest that in some cases, it may be necessary to produce materials beyond those that were before the decision-maker where it is alleged that the decision-maker breached the rules of procedural fairness or was biased: see *Deer Lake Regional Authority Inc.* v. *Canada (Attorney General)*, 2008 FC 1281 (F.C.), at paras. 29-35; *Gagliano* v. *Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2006 FC 720, at paras. 50-52, aff’d 2007 FCA 131.

[53] Even though the Applicant raised jurisdictional and procedural fairness issues in the present case, it was not a situation where the additional material would have assisted the Court in determining the merits of the application. There was no question that the Inspector added the notations to the complaint form and submitted it to the Minister. There was also no dispute that the notations were made sometime around May 2009 and that all the material relevant to the Inspector’s actions in this regard was included in the CTR. Accordingly, the relevant facts required to determine the merits of the claim were before the Court. This is not a case in which the additional information would have been helpful to the Court in determining the jurisdictional or procedural fairness issues raised.

[54] There was no obvious reason why the additional information was being requested or why it would be required for the Court to consider the merits of the application. Since the Applicant failed to provide any cogent explanation as to why this information was required to determine the merits

of the application, the request was akin to a “fishing expedition” for some unknown purpose. This approach is unacceptable in a judicial review proceeding. In the words of the Federal Court of Appeal in *Access Information Agency Inc.* v. *Canada (Transport)*, 2007 FCA 224:

> 21. (…) The purpose of the rule is to limit discovery to documents which were in the hands of the decision-maker when the decision was made and which were not in the possession of the person making the request and to require that the requested documents be described in a precise manner. When dealing with a judicial review, it is not a matter of requesting the disclosure of any document which could be relevant in the hopes of later establishing relevance. Such a procedure is entirely inconsistent with the summary nature of judicial review. If the circumstances are such that it is necessary to broaden the scope of discovery, the party demanding more complete disclosure has the burden of advancing the evidence justifying the request.

[55] For all of the above reasons, I therefore find that the Applicant has failed to demonstrate a valid basis for intervening with Prothonotary Morneau’s discretionary decision dismissing the Rule 318 motion.

ORDER

THIS COURT ORDERS that the Applicant's motion under Rule 51 be dismissed, with costs to the Respondent in both files.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-279-10 T-280-10
STYLE OF CAUSE:	**ESGENOÔPETITJ (BURNT CHURCH) FIRST NATION** **v.** **ALMA BOUCHER IN HER CAPACITY AS INSPECTOR, HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, LABOUR PROGRAM, ANDREW CURTIS BARTIBOGUE, AND E. THOMAS CHRISTIE, Q.C.**
PLACE OF HEARING:	Fredericton, New Brunswick
DATE OF HEARING:	July 13, 2010
REASONS FOR ORDER AND ORDER:	de MONTIGNY J.
DATED:	November 29, 2010

APPEARANCES:

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Patricia MacPhee	FOR THE RESPONDENT

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