Federal Court of Appeal | Cour d'appel fédérale

Date: 20150302

Docket: A-188-14

Citation: 2015 FCA 57

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

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA

Appellant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, ROGER SOUTHWIND for himself, and on behalf of the members of the Lac Seul Band of Indians, and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Respondents

Heard at Ottawa, Ontario, on February 26, 2015.

Judgment delivered at Ottawa, Ontario, on March 2, 2015.

REASONS FOR JUDGMENT BY: STRATAS J.A.

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

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] Her Majesty the Queen in Right of Manitoba appeals from the Order dated March 27, 2014 of the Federal Court (*per* Justice O'Reilly): 2014 FC 296. The Federal Court dismissed Manitoba's motion for summary judgment.

[2] Manitoba's motion arose within an action presently in the Federal Court. Mr. Southwind and the Lac Seul Band have sued Canada for damages for the flooding of their lands and the loss of certain hunting, fishing and harvesting rights when a dam was built. In response, Canada has brought third party claims against Manitoba and Ontario.

[3] In the third party claim against Manitoba, Canada seeks indemnity and contribution arising from a 1928 cost-sharing agreement, the Lac Seul Storage Agreement. This Agreement has been enshrined in legislation: *The Lac Seul Conservation Act, 1928*, 18-19 Geo. V, c. 32. Under the Agreement, Manitoba is to indemnify Canada for certain capital costs associated with the dam that gave rise to the flooding.

[4] In 1929, Canada transferred its public lands to Manitoba: *Manitoba Natural Resources Transfer Act*, C.C.S.M., c. N30. Among other things, the Act specifically provides that Manitoba must pay Canada for its expenditures under the Agreement.

[5] Manitoba sought summary judgment in the Federal Court on two grounds. First, Manitoba submitted that Canada agreed in 1943 to settle for all time whatever liability Manitoba had under the Agreement and these statutes. Manitoba also submitted that Canada's third party claim was time-barred.

[6] The Federal Court rejected both grounds and dismissed the motion for summary judgment, finding that there was a "genuine issue for trial" within the meaning of Rule 215(1) of the *Federal Courts Rules*, SOR/98-106.

[7] In this Court, absent an error on an extricable point of law, the Federal Court's decision can be set aside only if it committed palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[8] In its memorandum, Manitoba characterized much of what the Federal Court did as an error of law. Manitoba has not persuaded me that there are any errors of law that would vitiate its decision.

[9] As for demonstrating palpable and overriding error, Manitoba has a high threshold to meet and it has not met it:

> Palpable and overriding error is a highly deferential standard of review. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall. [citations omitted]

(*Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at paragraph 46.)

[10] In its memorandum of fact and law, Manitoba points to the Supreme Court's recent decision concerning summary judgment and submits that it bears upon the issues in this appeal: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.

[11] In my view, *Hryniak* does bear upon the summary judgment issues before us, but only in the sense of reminding us of certain principles resident in our Rules. It does not materially change the procedures or standards to be applied in summary judgment motions brought in the Federal Court under Rule 215(1).

[12] *Hryniak* considered the summary judgment rules in Ontario's *Rules of Civil Procedure*. The summary judgment rules in the *Federal Courts Rules* are worded differently from those in Ontario.

[13] The *Federal Courts Rules* are a federal regulation and have the status of laws that the Federal Courts cannot change. Care must be taken not to import the pronouncements in *Hryniak* uncritically, thereby improperly amending the *Federal Courts Rules*.

[14] The summary judgment rules in the *Federal Courts Rules* were amended just six years ago to take into account the sorts of considerations discussed in *Hryniak* and the challenges posed by modern litigation: see SOR/2009-331, section 3. Foremost among these amendments was the introduction of an elaborate and aggressive summary trial procedure in Rule 216, available in accordance with the specific wording of the *Federal Courts Rules*. I turn now to the specific wording of Rules 215 and 216.

[15] Under Rule 215(1) of the *Federal Courts Rules*, where there is "no genuine issue for trial" the Court "shall" grant summary judgment. The cases concerning "no genuine issue for trial" in the Federal Courts system, informed as they are by the objectives of fairness, expeditiousness and cost-effectiveness in Rule 3, are consistent with the values and principles expressed in *Hryniak*. In the words of *Burns Bog Conservation Society v. Canada*, 2014 FCA 170, there is "no genuine issue" if there is "no legal basis" to the claim based on the law or the evidence brought forward (at paragraphs 35-36). In the words of *Hryniak*, there is "no genuine issue" if there is no legal basis to the claim or if the judge has "the evidence required to fairly

and justly adjudicate the dispute" (at paragraph 66). *Hryniak* also speaks of using "new powers" to assist in that determination (at paragraph 44). But under the text of the *Federal Courts Rules* those powers come to bear only later in the analysis, in Rule 216.

[16] Where, as the Federal Court found here, there is a genuine issue of fact or law for trial, then the Court "may" (*i.e.*, as a matter of discretion), among other things, conduct a summary trial under Rule 216: Rule 215(3). As is evident from Rule 216, summary trials supply the sort of intensive procedures for pre-trial determinations that the Court in *Hryniak* (at paragraph 44) called "new powers" for the Ontario courts to exercise.

[17] For all of the foregoing reasons, like the Alberta Court of Appeal in *Can v. Calgary (Police Service)*, 2014 ABCA 322, 560 A.R. 202, I conclude that *Hryniak* does not change the substantive content of our procedures. However it does remind us of the imperatives and principles that reside in our summary judgment and summary trial rules – imperatives and principles that, by virtue of Rule 3, must guide the interpretation and application of our Rules.

[18] In the case at bar, Manitoba did not ask for a summary trial and so, quite properly, the Federal Court did not conduct one. Manitoba does not suggest that the Federal Court erred in that respect.

[19] Thus, the question before us boils down to whether the Federal Court committed palpable and overriding error in finding that there was a genuine issue for trial in this case.

[20] Put another way, is there an obvious flaw striking at the core of the Federal Court's statement (at paragraph 24) that "[t]he evidence before [it] does not permit [it] to arrive at definitive conclusions" on the meaning and effect of the 1943 Agreement and the limitation period issue?

[21] Before the Federal Court, Manitoba submitted that the 1943 Agreement unambiguously settled all of Manitoba's obligations, past, present and future, under the Lac Seul Storage Agreement and the Acts. Thus, in its view, as far as the 1943 Agreement was concerned, there was "no genuine issue for trial" under Rule 215(1) and so summary judgment must be granted.

[22] On the facts and the law before it on that point, the Federal Court concluded that it could not rule in Manitoba's favour. In its view, the evidence before it was "insufficiently definitive" to support Manitoba's position and the parties did not have a "clear understanding" that all obligations "for all time" were being settled (at paragraph 14).

[23] In this Court, Manitoba submits that this is vitiated by palpable and overriding error. I disagree. The Federal Court's finding can be sustained on the evidence before it leading up to and including the letters that are said to constitute the 1943 Agreement. A review of the letters shows that it is ambiguous whether the 1943 Agreement settled Manitoba's obligations, past, present and future, or just settled the amount of loss known to that time. On this critical point, the letters that constitute the 1943 Agreement do not provide clarity and there are no releases or formal agreement documents settling the point.

[24] I also note that it is one thing for a later agreement to settle obligations created in an earlier agreement. But it may be quite another where the earlier agreement, here the Lac Seul Storage Agreement, has been enshrined in legislation: *Quebec (Attorney General) v. Cree Regional Authority*, [1991] 3 F.C. 533, 81 D.L.R. (4th) 659 (C.A.). Different principles may well apply where parties attempt to settle: *Ontario (Human Rights Commission) v. Etobicoke*, [1982] 1 S.C.R. 202 at page 213, 132 D.L.R. (3d) 14. This issue, not fully canvassed in the Federal Court or this Court, adds another dimension of uncertainty into the matter.

[25] In argument before us, Manitoba stressed that a trial would add no other material evidence that would be helpful on these issues. That may or may not be so, but that is beside the point. Whether or not more evidence might be available later, the Federal Court concluded that Manitoba had not established its position on the evidence filed on the motion.

[26] Manitoba also pointed to the relatively brief reasons and cursory analysis of the Federal Court and submitted that the Federal Court did not take a good hard look at the evidence, as it must do in a summary judgment motion under Rule 215. I disagree. The reasons are brief but offer enough to show that Manitoba's motion for summary judgment cannot succeed. Further, "absent…proof that the trial judge forgot, ignored or misapprehended the evidence, leading to an error in law," this Court must presume that the judge considered all of the evidence filed: *Housen*, *supra* at paragraph 46. It must also be borne in mind that judges who dismiss a motion for summary judgment are mindful that there will be a trial so they are careful not to write more than what is necessary.

[27] As for the issue whether Canada is time-barred, I see no palpable and overriding error in the Federal Court's analysis (at paragraph 18). The cause of action asserted by Canada in its third party claim against Manitoba is indemnity. Canada pleads that by section 8 of the *Manitoba Natural Resource Transfer Act*, *supra*, Manitoba must pay Canada "the sums which have been or shall hereafter be expended by Canada pursuant to the [Lac Seul Storage Agreement]." In its defence to the main action, Canada denies that any such sums are owing: Statement of Defence, at paragraphs 67-72. If the Federal Court awards damages against Canada in the main action, Manitoba may become liable to Canada for its share of monies that fall within any part of the definition of "capital cost" as set out in the *Lac Seul Conservation Act*, *supra* and that are payable under section 8 of the *Manitoba Natural Resource Transfer Act*. But that triggering event has not yet happened. Therefore, the cause of action of indemnity has not yet arisen and so time under a limitation period has not begun to run. See, *e.g.*, *Addison & Leyen Ltd v Fraser Milner Casgrain LLP*, 2014 ABCA 230, and the discussion in it concerning the distinction between indemnity and other causes of action. Canada is entitled to plead whatever causes of action are advantageous to it, and this includes pleading a cause of action that is not time-barred, even though others may have existed at one time and are now time-barred: *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481.

[28] Finally, the Federal Court also found no factual basis to support Manitoba's submission that Canada's claim is barred by laches or estoppel. Again, Manitoba has not established any palpable and overriding error associated with that conclusion.

[29] Nothing in these reasons should be taken as determining any factual issues to be pursued at the trial.

[30] Accordingly, I would dismiss the appeal with costs.

"David Stratas"

J.A.

“I agree
Johanne Gauthier J.A.”

“I agree
A.F. Scott J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-188-14
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE O'REILLY DATED MARCH 27, 2014, NO. T-2579-91	
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA, ROGER SOUTHWIND for himself, and on behalf of the Members of the Lac Seul Band of Indians, and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 26, 2015
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	GAUTHIER J.A. SCOTT J.A.
DATED:	MARCH 2, 2015

APPEARANCES:

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