Federal Court of Appeal  Cour d'appel fédérale

Date: 20171122

Docket: A-221-17

Citation: 2017 FCA 228

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

BETWEEN:

JOHN MARK LEE JR.

Appellant

and

CORRECTIONAL SERVICE CANADA, PAROLE BOARD OF CANADA, PAROLE APPEAL DIVISION and THE ATTORNEY GENERAL OF CANADA

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 22, 2017.

REASONS FOR ORDER BY: STRATAS J.A.

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

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REASONS FOR ORDER

STRATAS J.A.

[1] The respondents move for dismissal of this appeal because it has no reasonable chance of success.

[2] The appellant is an inmate in a federal penitentiary. His notice of appeal raises only one ground. The appellant alleges that the Federal Court "overlooked [his] Amended Judicial Review application" and failed to consider it. As a result, "no decision in regard to the Amended Judicial Review application" was made.

[3] According to evidence filed by the respondents, the Federal Court never had an amended notice of application before it. Thus, say the respondents, the appellant's only ground of appeal cannot succeed.

[4] The respondents rely upon Rule 74 for the summary dismissal of the appeal. Rule 74 allows this Court to order that "a document that is not filed in accordance with these Rules or pursuant to an order of the Court or an Act of Parliament be removed from the Court file." The respondents do not identify an order of the Court, an Act of Parliament or a Rule offended by the filing. Instead, the respondents seek a summary dismissal of the appeal on the ground that it cannot possibly succeed. Rule 74 does not support a dismissal on that basis alone.

[5] Nevertheless, the case law of this Court shows that summary dismissals of appeals in circumstances similar to these have been allowed at this early stage: see, *e.g.*, *Lessard-Gauvin v. Canada (Attorney General)*, 2013 FCA 147, 453 N.R. 380; *Fotinov v. Royal Bank of Canada*, 2014 FCA 70. Neither of these cases identifies the authority that permits this to happen. Further, the *Federal Court Rules*, SOR/98-106 do not specifically authorize an appeal to be struck out at this early stage.

[6] In my view, the authority for summary dismissal of an appeal at this early stage is found in the Federal Courts' plenary power to manage their processes and proceedings: see, *e.g.*, *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at paras. 47-48 in the context of applications, but in principle equally applicable here; see also *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 443 N.R. 378 at para. 35; *Pfizer Canada Inc. v. Teva Canada Ltd.*, 2016 FCA 218, 141 C.P.R. (4th) 165 at para. 17; *Philipos v. Canada (Attorney General)*, 2016 FCA 79, 483 N.R. 328 at para. 10.

[7] The Supreme Court has recognized that the Federal Courts have these plenary powers. It has described them as being analogous to the inherent powers of provincial superior courts to control their own processes and proceedings. See *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 224 N.R. 241 at paras. 35-36, the most comprehensive Supreme Court case to date on the nature of the powers of the Federal Courts, a case that remains foundational and authoritative.

[8] The idea is that the Federal Courts' plenary powers emanate from their constitutional status as courts, not from any particular legislative provision in the *Federal Courts Act*, R.S.C. 1985, c. F-7 or the *Federal Courts Rules*. The Federal Courts are not just ordinary agencies of government but rather part of the judicial branch within the constitutional separation of powers. If courts are to be courts and to fulfil their function as part of the judicial branch, they must have certain plenary powers to manage their processes and proceedings.

[9] Cases decided by the Supreme Court after *Liberty Net* have alluded to these powers—in one case at the level of *obiter* in a single paragraph, and in another case buried as an afterthought in a endnote: see, respectively *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 19 and *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617. Perhaps because the treatment of the powers is brief, both cases fail to cite *Liberty Net*. But both loosely suggest that the Federal Courts' plenary powers are "necessarily incidental" to statutory powers already granted, rather than powers stemming from the Federal Court's status as courts within the judicial branch.

[10] In fact, in terms of the powers the Federal Courts have, *Cunningham* seems to place the Federal Courts on the same footing as administrative tribunals and other administrative functionaries throughout the government. But *Cunningham* is not the only word on this point.

[11] Again, there is *Liberty Net*. And in a brief comment in another case, the Supreme Court seems to have recognized the Federal Courts as superior courts established under the federal power in the *Constitution Act, 1867* to create federal courts, not just as mere administrative functionaries: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 at para. 136 (not cited in *Cunningham* and *Windsor*); see also the clear text of section 4 of the *Federal Courts Act*.

[12] In my view, the Supreme Court's holdings in *Charkaoui* and *Liberty Net* are unassailable. The Federal Courts cannot be equated to administrative tribunals. As is suggested in *Liberty Net*, the Federal Courts—like the Supreme Court, the provincial courts (both superior and otherwise),

the Tax Court and military courts—are fully fledged courts within the judicial branch and, by virtue of this, have all the plenary powers of courts to manage their processes and proceedings.

[13] It is to be hoped the next time the Supreme Court has the occasion to discuss the powers of the Federal Courts, it will confirm this position. After all, the Supreme Court and the Federal Courts (through their predecessor, the Exchequer Court) are both statutory courts under section 101 of the *Constitution Act, 1867*, born at the same time from a single joint statute: *Supreme and Exchequer Court Act*, S.C. 1875, c. 11. Thus, in terms of their plenary powers—*i.e.*, their ability as courts to manage their processes and proceedings—the Supreme Court and the Federal Courts must be seen as identical twins. In this respect, one should not be treated as lesser than the other.

[14] The plenary powers of the Federal Courts to manage their processes and proceedings take their colour from contemporary notions of the nature and purpose of proper proceedings in the Federal Courts. Key here is the necessary and new litigation culture urged upon us by the Supreme Court in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. The Federal Courts are public property that many litigants with arguable cases need to access on a timely basis: *Canada v. Olumide*, 2017 FCA 42.

[15] From these principles, it follows that clearly meritless proceedings—cases that are clearly doomed to fail—should be met with the exercise of the Federal Courts' plenary powers to manage their processes and proceedings. They must not be allowed to continue. They must be stopped in their tracks.

[16] Turning to the motion for summary dismissal before us, the respondents have filed an affidavit that appends as an exhibit the printout of a "proceedings query" in the Federal Court. A "proceedings query" identifies all of the documents that were filed in the Federal Court. From this, we see that there was no amended notice of application before the Federal Court nor was there a motion to amend. There is no other admissible evidence suggesting the contrary.

[17] Thus, the appellant's single ground of appeal has no hope of success. Since there was neither an amended notice of application before the Federal Court nor a motion to amend, the Federal Court was under no obligation to deal with one.

[18] Although the appellant did not appeal the merits of the application for judicial review that the Federal Court dismissed, I wish to say a few words about it by way of guidance.

[19] The material before us is not clear and is difficult to understand at times. But it seems that the appellant may have a viable option open to him.

[20] In the Federal Court, the appellant's application for judicial review challenged a decision of the Parole Board. The appellant had appealed this decision to the Parole Board Appeal Division and also brought a judicial review against it. The Appeal Division released its decision and dismissed the appellant's appeal from the Parole Board. The Federal Court dismissed the judicial review of the Parole Board's decision on the ground that the Appeal Division was an adequate and alternative forum and so the decision of the Appeal Division should be the focus of

attack. On the material before us, the appellant has not yet applied for judicial review of the Appeal Division's decision.

[21] What seems to have happened is that the appellant intended to amend his application for judicial review in the Federal Court in order to challenge the decision of the Appeal Division that had just come out. But, as the recorded entries show, the amendment, which he says was reduced to writing, was not placed or was not properly placed before the Federal Court.

[22] Even if the appellant had properly placed a motion to amend before the Federal Court, the Federal Court was bound to reject it. The Appeal Division's decision had to be attacked by separate notice of application supported by an evidentiary record pertaining to that decision and a memorandum of fact and law; further, the respondent had every right to file materials in response to the application.

[23] From the material before me, I note two things. First, the appellant says he had presented his "amendment" challenging the Appeal Division's decision to the Federal Court within the time permitted for challenge: see Reply dated October 19, 2017, para. 6. Second, the appellant's clear intention seems to have been to challenge the Appeal Division's decision ever since it was made. The appellant has just chosen the wrong way to launch his challenge.

[24] If the appellant still wishes to challenge the Appeal Division's decision, he should bring an application for judicial review of that decision in the Federal Court and bring a motion for an extension of time for doing so. Motions for extensions of time are governed by a legal test. A

recent, fulsome expression of the test appears in *Canada (Attorney General) v. Larkman*, 2012 FCA 204, 433 N.R. 184. I would encourage the appellant to ensure that, to the extent possible, his written representations on the motion are focused on that test and nothing else.

[25] Therefore, for the foregoing reasons, I would dismiss the appeal.

"David Stratas"

J.A.

"I agree
Johanne Trudel J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-221-17
STYLE OF CAUSE:	JOHN MARK LEE JR. v. CORRECTIONAL SERVICE OF CANADA, PAROLE BOARD OF CANADA, PAROLE APPEAL DIVISION AND THE ATTORNEY GENERAL OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCES OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
CONCURRED IN BY:	TRUDEL J.A. NEAR J.A.
DATED:	NOVEMBER 22, 2017

WRITTEN REPRESENTATIONS BY:

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